UNITED STATES – ANTI-DUMPING ADMINISTRATIVE REVIEWS AND OTHER MEASURES RELATED TO IMPORTS OF CERTAIN ORANGE JUICE FROM BRAZIL

WT/DS382

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US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

I. INTRODUCTION

1. This dispute is about whether the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), if properly interpreted in accordance with the customary rules of interpretation and proper application of the standard of review, must be understood to impose the obligations Brazil claims. In fact, properly interpreted, these Agreements do not impose such obligations.

2. It is a fundamental principle of the customary rules of interpretation of public international law that any interpretation must address the text of the agreement and may not impute into the agreement words and obligations that are not there.[1] Brazil, relying upon past Appellate Body reports, asks the Panel to interpret the AD Agreement to include a general prohibition of "zeroing" that is based upon the concept of "product as a whole," a term that is absent from the text of the AD Agreement and the GATT 1994. A number of dispute settlement panels, in contrast, have found that there is no obligation to provide offsets – that is, to reduce antidumping duties on dumped imports by the amounts by which any other imports covered by the same assessment proceedings exceed normal value – in proceedings beyond the original investigation.[2]

3. At the heart of the disagreement over whether the AD agreement includes a general prohibition of "zeroing" is the issue of whether the term "dumping" may be reasonably interpreted in relation to specific transactions, that is, to mean that the export price of the product in a particular export transaction is less than the comparable price for the like product, in the ordinary course of trade, in the exporting country. The Appellate Body has taken the view that the definition of "dumping" may only be interpreted as applying at the "level of the product under consideration,"[3] not individual export transactions. In contrast, the United States has argued, and successive panels have agreed, that the interpretation that dumping may be determined at the level of individual export transactions is a permissible interpretation of the AD Agreement and the GATT 1994 under the customary rules of interpretation of public international law.

4. The rights and obligations of WTO Members flow, not from panels or the Appellate Body, but from the text of the covered agreements. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") plainly requires each panel to make its own objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. Further,

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[1] *India – Patents (AB)*, para. 45.

[2] *US – Stainless Steel (Mexico) (Panel)*, paras. 7.61, 7.149; *US – Zeroing (Japan) (Panel)*, paras. 7.216, 7.219, 7.222, 7.259; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.65, 5.66, 5.77; *US – Zeroing (EC) (Panel)*, paras. 7.223, 7.284; *see also US – Zeroing II (EC) (Panel)*, paras. 7.169 and n.131 (explaining that the panel generally "found the reasoning of the earlier panels on these issues to be persuasive").

[3] *US – Zeroing II (EC) (AB)*, para. 277.

in settling disputes among Members, WTO dispute settlement panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements."[4]

5. Accordingly, the United States requests that this Panel make an objective assessment of the matter before it and refrain from adopting Brazil's interpretation. Instead, the United States requests that this Panel remain faithful to the text of the AD Agreement by finding that the approach taken by the United States rests upon a permissible interpretation in accordance with the customary rules of interpretation of public international law and the standard of review under the AD Agreement, consistent with the interpretation offered by previous panels.

6. The United States also requests a preliminary ruling that two of the "measures" challenged by Brazil are outside of the Panel's terms of reference. The "Second Administrative Review" was not a "measure" in existence at the time of consultations and therefore could not have been subject to consultations, and Brazil's reference to "[t]he continued use of the U.S. 'zeroing procedures' in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil" does not comply with the specificity requirements of Article 6.2 of the DSU.

7. The arguments of the United States are presented in detail below, following a discussion of factual and procedural issues.[5]

II. FACTUAL BACKGROUND

8. The U.S. antidumping duty law provides domestic producers with a remedy against injurious dumping. The U.S. statute governing antidumping proceedings is the Tariff Act of 1930, as amended ("the Tariff Act"). The Tariff Act provides for two distinct phases in antidumping proceedings. The first phase of an antidumping proceeding is the investigation phase. The U.S. Department of Commerce ("Commerce") will determine whether dumping occurred during the period of investigation by calculating an overall weighted average dumping margin for each foreign producer/exporter investigated. Separately, the U.S. International Trade

[4] Article 19.2 of the DSU.

[5] In its panel request, Brazil challenges three alleged measures: (1) the first administrative review of the antidumping duty order on orange juice from Brazil; (2) the second administrative review of the antidumping duty order on orange juice from Brazil; and (3) the so-called "continued use of zeroing procedures" in the same antidumping duty order. Despite identifying the original investigation on orange juice from Brazil as a measure in its panel request, Brazil presents no arguments in its First Written Submission to support its claim that the original investigation is a WTO-inconsistent measure. The United States observes that Brazil also makes no arguments in its First Written Submission as to alleged inconsistency with Article 2.1, 2.4, or 18.4 of the AD Agreement, Articles II:1(a), II:1(b), or VI:1 of the GATT 1994, or Article XVI:4 of the Marrakesh Agreement establishing the WTO, and has not asked the Panel to make any findings with respect to these provisions. It appears that Brazil has abandoned these claims, so the United States has not addressed them in this submission. In any event, Brazil has failed to meet its burden of proof with respect to them.

Commission ("ITC") determines whether an industry in the United States is materially injured by reason of the dumped imports.

9. If Commerce finds that dumping existed during the period of investigation, and if the ITC determines that a U.S. industry was injured by reason of dumped imports, the investigation phase ends and the second phase of the antidumping proceeding – the assessment phase – begins. In the assessment phase, the focus is on the calculation and assessment of antidumping duties on specific entries by individual importers.

A. The Article 5 Investigation Phase

10. With respect to the investigation phase, Commerce will normally use the average-to-average method for comparable transactions during the period of investigation, although it may use transaction-to-transaction comparisons and, provided that there is a pattern of prices that differs significantly by customer, region, or time period, the average-to-transaction method.

11. In the investigation phase, Commerce must resolve the threshold question of whether dumping "exists" such that the imposition of an antidumping measure is warranted. Commerce uses the term "dumping margin" to mean "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Thus, the "dumping margin" is the result of a specific comparison between an export price (or constructed export price) and the normal value for comparable transactions. When average-to-average comparisons are used, comparable export transactions[6] are grouped together and an average export price is calculated for the comparison group which is compared to a comparable normal value.

12. In determining the "weighted average dumping margin," for each exporter/producer individually examined in an investigation, Commerce divides the aggregate amount from the sum of the comparison groups by the aggregate export prices of *all* U.S. sales by the exporter/producer during the period of investigation. If the overall weighted average dumping margin for a particular exporter/producer is *de minimis*, the exporter/producer is excluded from any antidumping measure. If the overall weighted average dumping margin for each exporter/producer is *de minimis*, the antidumping proceeding is terminated. If Commerce and the ITC make final affirmative determinations of dumping and injury, respectively, then Commerce orders the imposition of antidumping duties (an "antidumping duty order" or simply "order" in U.S. parlance). The issuance of an antidumping duty order completes the investigation phase.

B. The Article 9 Assessment Phase

[6] Similarity of export transactions is generally determined on the basis of product characteristics. Therefore, comparison groups are commonly referred to as "models." However, other factors affecting price comparability are taken into account, *e.g.*, level of trade.

13. Unlike investigations, which are subject to a single set of rules, the AD Agreement provides Members with the flexibility to adopt a variety of systems to deal with the assessment phase. There are two basic types of assessment systems – prospective and retrospective.

14. The United States has a retrospective assessment system. Under the U.S. system, an antidumping duty liability attaches at the time of entry, but duties are not actually assessed at that time. Instead, the United States estimates the duty to be assessed and collects a security in that amount in the form of a cash deposit at the time of entry. Once a year (during the anniversary month of the orders) interested parties may request a review to determine the final amount of duties owed on each entry made during the previous year.[7] Antidumping duties are calculated on a transaction-specific basis, and are paid by the importer of the transaction, as in prospective duty systems. If the final antidumping duty liability exceeds the estimated amount of the duty, the importer must pay the difference between the security and the duty. If the final antidumping duty liability ends up being less than the estimated amount, the difference between the final liability and the security is refunded. If no review is requested, the duty is assessed at the estimated rate, and the cash deposits made on the entries during the previous year are retained to pay the final duties. To simplify the collection of duties calculated on a transaction-specific basis, the absolute amount of duties calculated for the transactions of each importer are summed up and divided by the total entered value of that importer's transactions, including those for which no duties were calculated. U.S. customs authorities then apply that rate to the entered value of the imports to collect the correct total amount of duties owed.[8]

C. History of the Antidumping Duty Order on Orange Juice from Brazil

15. On February 11, 2005, following the filing of an antidumping duty petition by members of the U.S. orange juice industry, Commerce initiated an antidumping duty investigation on certain orange juice from Brazil. This proceeding covered two different forms of orange juice: frozen orange juice in highly concentrated form (FCOJM), and pasteurized single-strength orange juice which has not been concentrated. Also, because there was an existing antidumping duty order on frozen concentrated orange juice from Brazil, the investigation with respect to FCOJM covered only companies that were excluded or revoked from the existing order as of December 27, 2004. This meant that the investigation covered only 5 companies.

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[7] The period of time covered by U.S. assessment proceedings is normally twelve months. However, in the case of the first assessment proceeding following the investigation, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures.

[8] Brazil appears to challenge estimated duty rates calculated in two administrative reviews in this dispute. However, as explained above, estimated duty rates are not final antidumping duties. Rather, they are a security for the payment of antidumping duties and are governed by separate provisions of the GATT 1994. The AD Note to paragraphs 2 and 3 of GATT Article VI provides, "[A] contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization." In the context of a retrospective duty assessment system, the "determination of the facts" referenced in the Ad Note is the determination that in Article 9.3.1 of the AD Agreement is referred to as the "determination of final liability for payment of anti-dumping duties."

16. On January 13, 2006, Commerce published the final determination of sales at less than fair value, in which it determined that companies had engaged in dumping during the investigation period. On February 27, 2006, the ITC notified Commerce of its affirmative determination that the U.S. orange juice industry was being materially injured by dumped imports of subject merchandise from Brazil. Consequently, on March 9, 2006, Commerce published the antidumping duty order, imposing estimated rates of duty ranging from 12.46 percent to 60.29 percent.

17. *None of these dumping margins were impacted by zeroing*, as even the evidence submitted by Brazil shows.[9] One company, Montecitrus, informed Commerce during the course of the investigation that it would no longer participate in that investigation and was assigned a facts available rate, which was not determined using the zeroing methodology. For the remaining companies, none of the comparison averages used in calculating any of the dumping margins had negative values, *i.e.*, there were no negative values from non-dumped sales that were set to zero.

18. Since the order was imposed, the Department of Commerce has completed two administrative reviews of the order. In the first administrative review, Commerce reviewed two companies, Fischer S.A. ("Fischer") and Sucocitrico Cutrale, S.A ("Cutrale"). Commerce calculated antidumping duty margins of 0.45 percent for Cutrale and 4.81 percent for Fischer. Commerce instructed U.S. Customs and Border Protection ("CBP") not to collect any estimated duties with respect to Cutrale. In the second administrative review, completed on August 11, 2009, after consultations were held, Commerce reviewed these same two companies.[10] Commerce calculated a margin of 2.17 percent for Cutrale and zero percent for Fischer. Because Fischer's rate was zero percent, Commerce instructed CBP to liquidate entries from the prior year (suspended at the 4.81 percent rate) without regard to antidumping duties, and instructed CBP not to collect any estimated duties on entries after the date of the final results.

III. PROCEDURAL BACKGROUND

19. This dispute began when Brazil requested consultations on November 27, 2008. On May 22, 2009, Brazil filed a second request for consultations.[11] Consultations were held on January 16, 2009, and June 18, 2009.

20. On August 20, 2009, Brazil requested the establishment of a panel. On September 25, 2009, the Dispute Settlement Body ("DSB") established a panel pursuant to Brazil's request.

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[9] *See* Exhibits BRA-32, BRA-33.

[10] Because the second administrative review could not have been and was not subject to consultations, it is outside the Panel's terms of reference, as discussed in the request for a preliminary ruling below. However, aside from the fact that it is outside the terms of reference, Brazil's claims with respect to the review should be rejected for the reasons discussed in Section V.B below.

[11] WT/DS382/1/Add.1 (27 May 2009).

IV. GENERAL PRINCIPLES

A. Burden of Proof

21. In WTO dispute settlement, the burden of proving that an obligation has not been satisfied is on the complaining party. In *US – Corrosion-Resistant Steel CVD*, the Appellate Body explained that the complaining party bears the burden of proof with respect to an "as applied" claim:

> We note, first, that, in dispute settlement proceedings, Members may challenge the consistency with the covered agreements of another Member's laws, as such, as distinguished from any specific application of those laws. In both cases, the complaining Member bears the burden of proving its claim. In this regard, we recall our observation in *US – Wool Shirts and Blouses* that:
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> > … it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that *the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence*. (emphasis added)
>
> Thus, a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.[12]

22. Accordingly, the burden is on Brazil to prove that U.S. measures exist that are inconsistent with U.S. obligations under the relevant covered agreement.

B. Standard of Review

1. The Applicable Standard of Review Is Whether the Authority's Measure Rests on a Permissible Interpretation of the AD Agreement

23. Article 11 of the DSU defines generally a panel's mandate in reviewing the consistency with the covered agreements of measures taken by a Member. In a dispute involving the AD Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii)

[12] *US – Corrosion-Resistant Steel CVD (AB),* paras. 156-157 (emphasis in original) (footnote omitted).

of the AD Agreement with respect to an investigating authority's interpretation of provisions of the AD Agreement.[13] Article 17.6(ii) states:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

24. The question under Article 17.6(ii) is whether an investigating authority's interpretation of the AD Agreement is a permissible interpretation. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation." Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.[14]

25. The explicit confirmation that there are provisions of the AD Agreement that are susceptible to more than one permissible reading provides context for the interpretation of the AD Agreement. This provision reflects the negotiators' recognition that they had left a number of issues unresolved and that customary rules of interpretation would not always yield only one permissible reading of a given provision.

26. The *Argentina – Poultry* panel report, for example, involved a situation in which Argentina's investigating authority interpreted the term "a major proportion" in Article 4.1 of the AD Agreement (concerning the definition of "domestic industry") as a proportion that may be less than 50 percent. The panel upheld that interpretation as permissible, even while acknowledging that it may not be the only permissible interpretation. The panel recalled that "in accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it."[15] Similarly in this case, it is useful to bear in mind that Article 17.6(ii) applies and there may be multiple permissible interpretations of particular provisions in the AD Agreement.

27. In *US – Zeroing II (EC)*, however, the Appellate Body concluded that the interpretation of the AD Agreement under the customary rules of interpretation may "not generate conflicting, competing interpretations."[16] But if Article 17.6(ii) only sanctioned interpretations that all yield the same result, Article 17.6(ii) would have no function – that approach would render Article

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[13] *See EC – Bed Linen (Article 21.5) (AB)*, paras. 108, 114, 118.

[14] *See Argentina – Poultry*, para. 7.341 and n. 223.

[15] *See Argentina – Poultry*, para. 7.341 and n. 223.

[16] *US – Zeroing II (EC) (AB)*, para. 273.

17.6(ii) inutile. To the contrary, Article 17.6(ii) of the AD Agreement establishes a specific standard of review that operates in the context of dispute settlement.

28. Article 17.6(ii) explicitly contemplates that there are provisions of the AD Agreement that admit more than one permissible interpretation after applying the customary rules of interpretation and that not all of the permissible interpretations would yield the same or harmonious results. Article 17.6(ii) makes clear that a national authority's measure is to be upheld if it rests on "one" – not "all" – of the permissible interpretations of the AD Agreement. The very premise underlying Article 17.6(ii) is that two distinct interpretations can be permissible simultaneously: one that would render the measure at issue consistent with the AD Agreement, and another that would render the measure at issue inconsistent with the AD Agreement. By definition, the existence of the second interpretation cannot be a basis for finding that the first one is not permissible. Indeed, Article 17.6(ii) would only operate where the different permissible interpretations yield different findings in terms of whether a Member's measure conforms with its obligations under the AD Agreement.

2. The Panel Should Make an Objective Assessment of the Matter Before It and Not Add to or Diminish the Rights and Obligations Provided in the Covered Agreements

29. Article 11 of the DSU requires panels to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. The Appellate Body has explained that the matter includes both the facts of the case (and the specific measures at issue in particular) and the legal claims raised.[17] Articles 3.2 and 19.2 of the DSU contain the fundamental principle that the findings and recommendations of a panel or the Appellate Body, and the recommendations and rulings of the DSB, cannot add to or diminish the rights and obligations provided in the covered agreements.

30. While prior adopted panel and Appellate Body reports create legitimate expectations among WTO Members,[18] the Panel in this dispute is not bound to follow the reasoning set forth in any Appellate Body report. A panel is bound to adhere to its own objective assessment as to the interpretation of the covered agreements. The Appellate Body itself has stated that its reports are not binding on panels.[19] While the reasoning in such reports may be taken into account,

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[17] *Guatemala – Cement I (AB),* para. 73.

[18] *Japan – Alcohol Taxes (AB)*, p. 14.

[19] *See US – Softwood Lumber Dumping (AB),* para. 111 (citing *Japan – Alcohol Taxes (AB) and US – Shrimp (Article 21.5) (AB)*).

Members are free to explain why any reasoning or findings should *not* be adopted by a panel bound by Article 11 to make its own objective assessment.[20]

31. In connection with reports dealing with "zeroing," the panel in *US – Zeroing (Japan)*, in explaining its reasons for not applying certain reasoning and findings of the Appellate Body, highlighted the obligation of the panels to make their own objective assessment, in accordance with Article 11, and the requirement that recommendations and rulings of the DSB not add to or diminish the rights and obligations provided in covered agreements.[21] In *US – Stainless Steel (Mexico)*, the panel agreed with this conclusion and explained that "the concern over the preservation of a consistent line of jurisprudence should not override a panel's task to carry out an objective examination of the matter before it through an interpretation of the relevant treaty provisions in accordance with the customary rules of interpretation of public international law."[22]

32. Likewise, recently in *US – AD Measures on Carrier Bags*, the panel correctly insisted that it had to satisfy itself that Thailand had established a *prima facie* case by presenting evidence and arguments to identify the measure being challenged and explain the basis for the claimed inconsistency with a WTO provision, despite the fact that the responding party did not contest the claims made by Thailand.[23] The panel stated, "[N]otwithstanding the fact that the United States is not seeking to refute Thailand's claim, we must satisfy ourselves that Thailand has established a *prima facie* case of violation of Article 2.4.2 of the Anti-Dumping Agreement."[24]

33. The United States recognizes that the panel in *US – Zeroing II (EC)*, while acknowledging the reasoning of previous panels that there is no obligation to provide offsets outside of the context of the weighted-average-to-weighted-average comparison in investigations was "persuasive," ultimately found that this interpretation was inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 solely because it differed from an alternative interpretation developed in Appellate Body reports.[25] However, Article IX:2 of the

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[20] *US – Softwood Lumber Dumping (AB),* n. 175.

[21] *US – Zeroing (Japan) (Panel)*, para. 7.99 and n. 733.

[22] *US – Stainless Steel (Mexico) (Panel)*, paras. 7.105.

[23] *US – AD Measures on Carrier Bags*, paras. 7.5-7.7. The panel in *US – AD Measures on Carrier Bags* cited approvingly the reasoning of the panel in *US – Shrimp AD Measure (Ecuador*), which had similarly concluded:

> [T]he fact that the United States does not contest Ecuador's claims is not sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a prima facie case.

US – Shrimp AD Measure (Ecuador), para. 7.9.

[24] *US – AD Measures on Carrier Bags (Thailand)*, para. 7.7.

[25] *US – Zeroing II (EC) (Panel)*, para. 7.169 and n.131.

Marrakesh Agreement Establishing the World Trade Organization confers the authority to adopt interpretations of the covered agreements exclusively upon the Ministerial Conference and the General Council.[26] Therefore, while the dispute settlement system serves to resolve a particular dispute, and to clarify agreement provisions in the context of doing so, neither panels nor the Appellate Body can adopt authoritative interpretations that are binding with respect to another dispute.

V. ARGUMENT

34. The U.S. argument in this submission is structured in the following manner. First, in Section A, the United States requests two preliminary rulings that certain "measures" identified in Brazil's panel request are not within the Panel's terms of reference.

35. In Section B, the United States responds to Brazil's "as applied" claims with respect to the two administrative reviews at issue.[27] Specifically, the United States will address Brazil's claim that the AD Agreement requires a Member to provide an offset for transactions exceeding normal value in assessment proceedings. In this regard, first, the Appellate Body found in *US – Softwood Lumber Dumping (AB)*, and several subsequent panels of trade remedies experts have agreed, that the obligation to provide offsets has a textual basis in the phrase "all comparable export transactions" when interpreted in an integrated manner with the term "margins of dumping" in Article 2.4.2.[28] Each of these panels also found that just as the textual basis for the obligation to provide offsets was limited to the context of average-to-average comparisons in the investigation phase, the obligation to provide offsets is also limited to the context in which that phrase applies. In addition, Brazil's interpretation that a general prohibition of zeroing can be derived from Article VI of the GATT 1994 and Article 2.1 of the AD Agreement is not consistent with the text and context of these provisions and other provisions of the AD Agreement. Moreover, not providing offsets for non-dumped transactions in particular assessment reviews is based on a permissible interpretation of the relevant provisions of the AD

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[26] The Appellate Body recognized this point in one of its earliest reports, when it noted that "Article IX:2 of the *WTO Agreement* provides: 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements'. Article IX:2 provides further that such decisions 'shall be taken by a three-fourths majority of the Members'. The fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere." *Japan – Alcohol Taxes (AB),* p. 13.

[27] As explained below, one of these reviews (the second administrative review) is outside the Panel's terms of reference. However, even aside from the fact that it is outside the terms of reference, Brazil's claims should be rejected with respect to the second administrative review for the reasons discussed in detail in Section V.B.

[28] *EC – Bed Linen (Panel)*, para. 6.117; *US – Softwood Lumber Dumping (Panel)*, para. 4.244; *US – Zeroing (EC) (Panel)*, paras. 7.27, 7.271; and *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.20, 5.21, 5.28-5.30; *US – Zeroing (Japan) (Panel)*, para. 7.82; *US – Stainless Steel (Mexico) (Panel),* para. 7.61; *US – Shrimp (Thailand) (Panel)*, paras. 7.33, 7.35; *US –Shrimp AD Measure (Ecuador)*, paras. 7.38, 7.41; *US – AD Measures on Carrier Bags*, paras. 7.22, 7.24.

Agreement. Furthermore, Brazil's claim of inconsistency with Article 9.3 of the AD Agreement and Article VI:2 of the GATT must also fail because it is contingent on Brazil's misinterpretation of obligations under Article VI of the GATT 1994 and Article 2.1 of the AD Agreement.

36. In Section C, the United States addresses Brazil's claim with respect to what Brazil considers to be the "continued use of the U.S. 'zeroing procedures' in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of certain orange juice from Brazil."[29] Aside from the fact that such a "measure" does not exist and is not within the Panel's terms of reference, Brazil has failed to meet its burden of proof that such measure is inconsistent with the cited provisions of the WTO agreements.

A. Requests for Preliminary Rulings

37. The United States requests a preliminary ruling that "[t]he 2007-2008 anti-dumping duty administrative review on certain orange juice from Brazil (the 'Second Administrative Review')" is not within the Panel's terms of reference. The Second Administrative Review was not a measure in existence at the time of Brazil's request for consultations and therefore could not have been subject to consultations. It is consequently not within the Panel's terms of reference.

38. The United States also requests a preliminary ruling that, with respect to Brazil's claim against "[t]he continued use of the U.S. 'zeroing procedures' in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil," this alleged "measure" is outside the Panel's terms of reference because no such "measure" exists and not surprisingly Brazil's panel request with respect to this "measure" does not comply with the specificity requirements of Article 6.2 of the DSU. Moreover, in including this purported measure in its panel request, Brazil appears in fact to be challenging an indefinite number of measures that are not, and may never be, in existence.

1. The Second Administrative Review Is Not Within the Panel's Terms of Reference Because It Was Not Subject to Consultations

39. A panel's terms of reference are determined by the complaining party's request for the establishment of a panel, which pursuant to Article 6.2 of the DSU must "identify the specific measures at issue." However, a Member may not request the establishment of a panel with regard to any measure. It may only file a panel request with respect to a measure upon which the consultations process has run its course. Specifically, Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if "the consultations fail to settle a dispute."

[29] Brazil's First Written Submission, para 12.

40. In turn, Article 4.4 of the DSU provides that a request for consultations must state the reasons for the request, "including identification of the measure at issue and an indication of the legal basis for the complaint."

41. There is a clear progression between the measures discussed in consultations conducted pursuant to Article 4 of the DSU and the measures identified in the request to establish a panel that, in turn, form the basis of the panel's terms of reference. Indeed, the Appellate Body in *Brazil – Aircraft* stated that:

> Articles 4 and 6 of the DSU . . . set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.[30]

Moreover, the Appellate Body has found that "as a general matter, consultations are a prerequisite to panel proceedings."[31]

42. These rules apply with equal force to disputes brought under the AD Agreement, and the AD Agreement itself clarifies further the relationship between consultations and panel requests under that Agreement.[32] Article 17.4 of the AD Agreement states that a Member may only refer "the matter" to the DSB following a failure of consultations to achieve a mutually agreed solution, and final action by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings. In *Guatemala – Cement* (AB), the Appellate Body explained that what constitutes the "matter" is the "key concept in defining the scope of a dispute that may be referred to the DSB under the *Anti-Dumping Agreement* and, therefore, in identifying the parameters of a panel's terms of reference in an anti-dumping dispute."[33] The Appellate Body analyzed the "matter" references in Articles 17.3 through Article 17.6 of the AD Agreement and found that the specific requirements in Article 6.2 of the DSU – identification of the specific measure at issue and the legal basis for the claim – define the "matter" and, accordingly, the panel's terms of reference.[34] The Appellate Body also found that the term "matter" has the same meaning in Article 17.3, relating to the request for consultations,

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[30] *Brazil – Aircraft (AB)*, para. 131.

[31] *Mexico – HFCS (Article 21.5) (AB)*, para. 58.

[32] As the Appellate Body explained in *Guatemala – Cement I*, the provisions of Article 6.2 of the DSU and Article 17.5 of the AD Agreement are "complementary and should be applied together. A panel request made concerning a dispute brought under the Anti-Dumping Agreement must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU." *Guatemala – Cement I (AB)*, para. 75.

[33] *Guatemala – Cement I (AB)*, para. 70.

[34] *Guatemala – Cement I (AB)*, paras. 71-73.

and Articles 17.4 and 17.5, relating to the referral of a matter to the DSB and the request for the formation of a panel to examine the matter.[35]

43. Article 17.3 states that the consultations are to be held with the view of "reaching a mutually satisfactory resolution of *the matter*." Moreover, Article 17.4 provides that when "consultations pursuant to [Article 17.3 of the AD Agreement] have failed to achieve a mutually agreed solution" and "final action has been taken" by the administering authorities, a Member "may refer *the matter* to the Dispute Settlement Body ("DSB")." And, under Article 17.5, the DSB "shall, at the request of the complaining party, establish a panel to examine *the matter*" (emphasis added). In all cases, *the matter* encompasses the specific measure or measures identified by the complaining party, and the legal basis for the complaint.

44. Similar issues have arisen in a previous dispute. In *US – Certain EC Products*, the Appellate Body upheld the panel's finding that a particular action taken by the United States was not part of the panel's terms of reference because the EC, while referring to that action in its panel request, had failed to request consultations upon it. In particular, the EC's request for consultations made reference to the increased bonding requirements levied by the United States as of March 3, 1999, on EC listed products in connection with the *EC Bananas* dispute, but not to U.S. action taken on April 19, 1999, to impose 100 percent duties on certain designated EC products.[36] When the EC sought findings with respect to both the March 3rd measure and the April 19th action, the panel found that the March 3rd measure and April 19th measure were legally distinct, and that the April 19th action did not fall within the panel's terms of reference.[37]

45. The Appellate Body upheld the Panel's findings. The Appellate Body found that because the consultations request did not refer to the April 19th action, and as the EC admitted at the oral hearing that the April 19th action "was not *formally* the subject of consultations," it was not a measure in that dispute and fell outside the panel's terms of reference.[38]

46. In this dispute, Brazil seeks the establishment of a panel with respect to "[t]he 2007-2008 anti-dumping duty administrative review on certain orange juice from Brazil (the 'Second Administrative Review')". As reflected in Brazil's panel request, the final results of the second administrative review were issued on August 11, 2009, well after Brazil's request for consultations.

47. While the preliminary results of the second administrative review had been issued at the time of consultations, preliminary results are just that – preliminary. Preliminary results, such as

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[35] *Guatemala – Cement I (AB)*, para. 76.

[36] *US – Certain EC Products (AB)*, para. 70.

[37] *US – Certain EC Products (AB)*, para. 82.

[38] *US – Certain EC Products (AB)*, para. 70.

those issued in the second administrative review, are not final and, therefore, are subject to change. The publication of preliminary results simply affords interested parties an opportunity to provide comments, which Commerce considers before making a final determination. In this regard, the preliminary results are akin to an interim panel report, which has no effect until finalized. At the time of the preliminary results, no decision has even been made to levy definitive duties. Prior to the issuance of the final results of the second administrative review, it was entirely possible that no definitive duties would be levied at all. In fact, this is exactly what happened for one of the two respondents (Fischer) in the second administrative review. Furthermore, Brazil did not request a panel on the preliminary results (published on April 6, 2009), but rather on the final determination, published on August 11, 2009.[39]

48. At the time of Brazil's request for consultations, therefore, the second administrative review did not constitute a "measure" within the meaning of Article 4.4 of the DSU. Because, in turn, it was not (and could not have been) subject to consultations, the second administrative review is not within the Panel's terms of reference.

2. The "Continued Use of the U.S. 'Zeroing Procedures'" Fails for Lack of Specificity and Because It Purports to Include Future Measures

49. Under Article 6.2 of the DSU, a panel request must identify the "*specific* measures at issue" in the dispute,[40] and a panel's terms of reference under Article 7.1 are limited to those specific measures. In its request for the establishment of a panel, Brazil identifies as a "measure" the "continued use of the U.S. 'zeroing procedures' in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil." Brazil's request states further, "This measure concerns the continued use by the United States of 'zeroing procedures' in successive anti-dumping proceedings, in relation to the anti-dumping duty order issued in respect of imports of certain orange juice from Brazil (case no. A-351-840), including the original investigation and any subsequent reviews, by which duties are applied and maintained over a period of time. In particular, the use of zeroing continues in the most recent administrative review . . . by which duties are currently applied and maintained."

50. Brazil's identification of this purported measure in its panel request was inadequate to meet the requirement under Article 6.2. To the extent Brazil is referring to the investigation and first administrative review, Brazil's reference to "continued use" adds nothing to the references to those measures.

51. Furthermore, a general reference to an indeterminate number of potential measures does not satisfy the requirement of Article 6.2 that a panel request "identify the *specific* measures at

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[39] *See* Brazil's Request for the Establishment of a Panel, page 6 ("The final results of this Second Administrative Review were published in 74 Fed. Reg. 40167 on 11 August 2009.").

[40] Emphasis added.

issue" (emphasis added). Brazil cannot "identify" a "specific" measure that does not exist except in Brazil's mind. Rather, Brazil is speculating as to what may happen in the future. Such speculation is not an identification of a specific measure. As one example of the way in which Brazil is engaging in speculation, there is nothing to say that the results of any future antidumping proceeding would reflect "zeroing." For example, with respect to one of the two respondents in the second administrative review cited by Brazil, there was a zero margin of dumping and therefore no imposition of any duties; and, with respect to the investigation cited by Brazil, Brazil's own evidence shows that zeroing was not applied.

52. In addition, by including this purported measure in its panel request, Brazil appears to be challenging an indeterminate number of potential future measures. Future measures are outside of the scope of the Panel's terms of reference for another reason. Measures that are not yet in existence at the time of panel establishment are not within a panel's term of reference under the DSU.[41] Article 3.3 of the DSU provides that:

> [t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements *are being impaired* by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.[42]

In addition, not only would it be impossible to consult on a measure that does not exist, but a non-existent measure cannot meet the requirement of Article 4.2 of the DSU that the measure be "affecting" the operation of a covered agreement. As the *Upland Cotton* panel found, the challenged legislation could not have been impairing any benefits accruing to the complainant because it was not in existence at the time of the request for the establishment of a panel.[43] Similarly, in this case, indeterminate future measures that did not exist at the time of Brazil's panel request (and may never exist) could not be impairing any benefits accruing to Brazil.

B. The United States Methodology for Assessing Antidumping Duties Is Consistent with the Obligations in the Antidumping Agreement

1. There Is No General Obligation to Provide Offsets Outside of the Limited Context of Using Average-to-Average Comparisons under Article 2.4.2

[41] *See, e.g., United States – Upland Cotton (Panel)*, para. 7.158 (finding that a measure that had not yet been adopted could not form a part of the Panel's terms of reference); *Indonesia – Autos (Panel)*, para. 14.3 (agreeing with the responding party that a measure adopted after the establishment of a panel was not within the panel's terms of reference).

[42] Emphasis added.

[43] *US – Upland Cotton (Panel)*, paras. 7.158-7.160.

53. To the extent Brazil challenges the WTO-consistency of the zeroing methodology as applied in assessment proceedings, Brazil's claims directly contradict the text of the AD Agreement. As demonstrated below, the text and context of the relevant provisions of the AD Agreement, interpreted in accordance with customary rules of interpretation of public international law, do not support a general prohibition of zeroing that would apply in the context of assessment proceedings. The methodology used by the United States to calculate antidumping duties in the assessment proceedings in question rests on a permissible interpretation of the AD Agreement and is WTO-consistent.

54. The AD Agreement provides no general obligation to consider transactions for which the export price exceeds normal value as an offset to the amount of dumping found in relation to other transactions at less than normal value. The exclusive textual basis for an obligation to account for such non-dumping in calculating margins of dumping appears in connection with the obligation found in Article 2.4.2 that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a *weighted average normal value with a weighted average of prices of all comparable export transactions* . . . ."[44] This particular text of Article 2.4.2 applies only within the limited context of determining whether dumping exists in the investigation phase when using the average-to-average comparison methodology in Article 2.4.2.[45] There is no textual basis for the additional obligations that Brazil would have this Panel impose.

55. In *US – Softwood Lumber Dumping (AB),* the Appellate Body specifically recognized that the issue before it was whether zeroing was prohibited under the average-to-average comparison methodology found in Article 2.4.2.[46] Thus, the report found only that "zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology."[47] The Appellate Body reached this conclusion by interpreting the terms "margins of dumping" and "all comparable export transactions" as they are used in Article 2.4.2 in an "integrated manner."[48] In other words, the term "all comparable export transactions" was integral to the interpretation that the multiple comparisons of average normal value and average export price for averaging groups did not constitute an average-to-average comparison of all comparable export transactions unless the results of all such comparisons were aggregated. The obligation to provide offsets, therefore, was tied to the text of the provision addressing the use of

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[44] Emphasis added. *See US – Softwood Lumber Dumping (AB)*, paras. 82, 86, and 98.

[45] *US – Zeroing (Japan) (Panel)*, para. 7.213; *US – Zeroing (EC) (Panel)*, para. 7.197; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.65-5.66 and 5.77.

[46] *US – Softwood Lumber Dumping (AB)*, paras. 104, 105, and 108.

[47] *US – Softwood Lumber Dumping (AB)*, para. 108.

[48] *US – Softwood Lumber Dumping (AB)*, paras. 86 - 103.

the average-to-average comparison methodology in an investigation. It did not arise out of any independent obligation to offset prices.

56. To the extent that Brazil argues that there is either a general prohibition of "zeroing," or one specifically applicable to the more particular context of assessment proceedings, such an argument cannot be reconciled with the interpretation articulated in *US – Softwood Lumber Dumping (AB)*, wherein the phrase "all comparable export transactions" in Article 2.4.2 meant that zeroing was prohibited in the context of average-to-average comparisons in investigations. If, as Brazil seems to argue, there were a general prohibition of zeroing that applies in all proceedings and under all comparison methodologies, the meaning ascribed to "all comparable export transactions" by the Appellate Body in that dispute would be redundant of the general prohibition of zeroing.

57. The need to avoid such redundancy was recognized in *US – Zeroing (Japan) (AB)*. As noted above, in *US – Softwood Lumber Dumping (AB)*, "margins of dumping" and "all comparable export transactions" were interpreted in an integrated manner. The Appellate Body found that in aggregating the results of the model-specific comparisons, "all" comparable export transactions must be accounted for. Thus, the phrase necessarily referred to all transactions across all models of the product under investigation, *i.e.,* the product "as a whole." The textual reference "all comparable export transactions" was the basis for the conclusion that "product" must mean "product as whole" and margins of dumping may not be based on individual averaging group comparisons. The Appellate Body subsequently relied on this "product as a whole" concept, although in a manner detached from its underlying textual basis, in concluding that margins of dumping cannot be calculated for individual transactions.[49] In *US – Zeroing (Japan) (AB)*, the Appellate Body reinterpreted "all comparable export transactions" to relate solely to all transactions within a model, and not across models of the product under investigation.[50] However, this was the only textual basis for the reasoning in *US – Softwood Lumber Dumping (AB)*.[51]

58. Subsequent to *US – Softwood Lumber Dumping (AB)*, several panels examined whether the obligation not to "zero" when making average-to-average comparisons in an investigation extended beyond that defined context. Consistent with their obligation to make an objective assessment of the matter, these panels determined that the customary rules of interpretation of

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[49] *US – Zeroing (EC) (AB),* paras. 126, 127; *US – Softwood Lumber Dumping (Article 21.5) (AB),* paras. 89, 114; *US – Zeroing (Japan) (AB),* paras. 121, 122, 151.

[50] *US – Zeroing (Japan) (AB)*, para. 124 ("[T]he phrase 'all comparable export transactions' requires that each group include only transactions that are comparable and that no export transaction may be left out when determining margins of dumping under [the average-to-average comparison] methodology.")

[51] The United States raised these points in its DSB statement and communication of February 20, 2007. *See also* Communication from the United States, WT/DS294/16, and Communication from the United States, WT/DS294/18.

public international law do not support a reading of the AD Agreement that expands the zeroing prohibition beyond average-to-average comparisons in an investigation.[52]

59. In making an objective assessment of the matter before it in this dispute, this Panel must give particular consideration to the special standard of review for matters arising under the AD Agreement – that a Member's measure may not be found inconsistent with the obligations set forth in the AD Agreement if the measure is based on a permissible interpretation of the AD Agreement. This Panel should recognize that the prior panels – each operating under the same obligation to make an objective assessment, examining the same AD Agreement, applying the same customary rules of interpretation of public international law and special standard of review found in Article 17.6(ii) of the AD Agreement – have found that a general prohibition against zeroing has no basis in the text of the AD Agreement. The analysis offered by the prior panels is persuasive and correct. For the reasons set forth below, the Panel should reach the same conclusion in the present dispute. This Panel, like the prior panels, should find that, at a minimum, it is permissible to interpret the AD Agreement as not prohibiting zeroing outside the context where the interpretation of "all comparable export transactions" articulated in the Appellate Body report in *US – Softwood Lumber Dumping* is applicable.

2. Article 2.1 of the AD Agreement and Article VI of the GATT 1994 Do Not Require the Provision of Offsets in Assessment Reviews

60. Ultimately this dispute is about the definitions of "dumping" and "margin of dumping." The issue is whether dumping and margins of dumping are concepts that may have meaning in relation to individual transactions, or if they necessarily must refer only to an aggregation of transactions. If these terms, as used in Articles 2.1 and 9.3 of the AD Agreement and Article VI of the GATT 1994, apply to the difference between export price and normal value for *individual transactions*, the U.S. assessment of antidumping duties in administrative reviews does not exceed the margin of dumping within the meaning of these provisions.

61. Brazil offers *no* textual analysis in support of its claim that offsetting is required by Article 2.1 of the AD Agreement and Article VI of the GATT 1994. Brazil's failure to provide a textual basis for its argument is unavoidable because the scope of the AD Agreement and GATT 1994 with respect to the measurement of dumping, is limited *by its terms* to instances in which there are *positive* differences between normal value and export prices.

62. In the AD Agreement, the word "margin" is modified by the word "dumping," giving it a special meaning. Paragraph 2 of Article VI of GATT 1994 provides that "[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1." When read with the provisions of paragraph 1, the "margin of dumping" is the price difference when a product has been "introduced into the commerce of an

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[52] *US – Zeroing (Japan) (Panel)*, para. 7.213; *US – Zeroing (EC) (Panel)*, para. 7.197; and *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.65; *US – Stainless Steel (Mexico) (Panel)*, paras. 7.61, 7.149.

importing country at less than its normal value," *i.e.,* the price difference when the product has been dumped.

63. The provisions of the AD Agreement must be read in conjunction with Article VI of GATT 1994.[53] While the AD Agreement does not provide a definition of "margin of dumping," it does define "dumping" in a manner consistent with the definition of "margin of dumping" provided in Article VI. Article 2.1 provides:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at *less than* its normal value, if the export price of the product exported from one country to another is *less than* the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[54]

64. The product is always "introduced into the commerce of another country" through individual transactions, and thus "dumping", as defined in Article 2.1 of the AD Agreement, is most certainly transaction-specific. The express terms of GATT 1994 provide that the *margin of dumping* is the amount by which normal value "exceeds" export price, or alternatively the amount by which export price "falls short" of normal value. Consequently, there is no textual support in Article VI of the GATT or the AD Agreement for the concepts of "negative dumping" and "product as a whole."

(a) The Concepts of "Dumping" and "Margin of Dumping" and the Term "Product" Have a Meaning in Relation to Individual Transactions

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[53] This interpretative principle has been underscored by the Appellate Body. In *Argentina – Footwear*, the Appellate Body stated that:

> The GATT 1994 and the *Agreement on Safeguards* are *both* Multilateral Agreements on Trade in Goods contained in Annex 1A of the *WTO Agreement*, and, as such, are *both* "integral parts" of the same treaty, the *WTO Agreement*, that are " binding on all Members". Therefore, the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are all provisions of one treaty, the *WTO Agreement*. . . . [A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.

Argentina – Footwear (AB), para. 81 (internal citations omitted). This basic principle applies equally to Article VI of the GATT 1994 and the AD Agreement. The official title of the AD Agreement is "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994." As an agreement whose object is to implement Article VI of GATT 1994, the AD Agreement is, by its very title, anchored in Article VI of GATT 1994.

[54] Emphasis added.

65. As an initial matter, Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994 are definitional provisions that, "read in isolation, do not impose independent obligations."[55] Nevertheless, these definitions are important to the interpretation of other provisions of the AD Agreement at issue in this dispute. In particular, Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define "dumping" and "margins of dumping" so as to require that export transactions be examined at an aggregate level. The definition of "dumping" in these provisions references "product . . . introduced into the commerce of another country at less than its normal value." This definition describes the real-world commercial conduct by which a product is imported into a country, *i.e.*, transaction by transaction.[56] Thus, dumping is defined as occurring in the course of a commercial transaction in which the product, which is the object of the transaction, is "introduced into the commerce" of the importing country at an export price that is "less than normal value."

66. In addition, the term "less than normal value" is defined as when the "price of the product exported . . . is less than the comparable price . . . ."[57] Again, this definition describes the real-world commercial conduct of pricing such that one price is less than another price. The ordinary meaning of "price" as used in the definition of dumping is the "payment in purchase of something."[58] This definition "can easily be applied to individual transactions and does not require an examination of export transactions at an aggregate level."[59]

67. The dumping definition's description of the conduct that antidumping duties are intended to remedy provides strong contextual support for the interpretation of these provisions that permits an authority to examine dumping in relation to the particular conduct described, *i.e.*, individual import transactions. Thus, in the *US – Zeroing (Japan)* dispute, the panel correctly concluded that the definition of dumping itself "undermines the argument that it is not permissible to interpret the concept of dumping as being applicable to individual sales transactions."[60]

68. In other words, dumping – as defined under these provisions – may occur in a single transaction. There is nothing in the GATT 1994 or the AD Agreement that suggests that dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price. Indeed, it is the foreign producer or exporter that

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[55] *US – Zeroing (Japan) (AB)*, para. 140.

[56] *See US – Zeroing (EC) (Panel)*, para. 7.285.

[57] Article VI:1 of the GATT 1994, Article 2.1 of the AD Agreement.

[58] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2349, meaning 1b (Exhibit US-1).

[59] *US – Zeroing (Japan) (Panel)*, para. 7.106.

[60] *US – Zeroing (Japan) (Panel),* para. 7.106.

benefits from the sales it makes at above normal value prices, certainly not the domestic industry injured by other sales made at dumped prices.

(b) The Concept of Dumping Has Been Historically Understood to Apply to Individual Transactions

69. Well before the recent debate about "zeroing" or "offsets," a Group of Experts convened to consider numerous issues with respect to the application of Article VI of the GATT 1947. In this report, the Group of Experts considered that the "ideal method" for applying antidumping duties "was to make a determination of both dumping and material injury in respect of each single importation of the product concerned."[61] In view of this report, it must be conceded that, as the panel in *US – Zeroing (Japan)* found, "the record of past discussions in the framework of GATT shows that historically the concept of dumping has been understood to be applicable at the level of individual export transactions."[62]

70. Taking the same view, the panel in *US – Softwood Lumber Dumping (Article 21.5)* reasoned:

> In referring to a "determination ... of ... dumping ... in respect of each single importation of the product concerned", the Group of Experts clearly envisaged the calculation of transaction-specific margins of dumping. This would suggest that the Group of Experts did not consider that there was anything in the definition of dumping set forth in Article VI of the GATT that would preclude the calculation of such transaction-specific margins.[63]

71. The United States recognizes that the Appellate Body has rejected the relevance of the Group of Experts report to the U.S. argument: first, in *US – Stainless Steel (Mexico)*, it appeared, on the grounds that the Group of Experts recognized that such a method was impracticable, particularly with respect to an injury determination,[64] and that the WTO Agreement entered into force "long after" the Group of Experts' report; and subsequently, in *US – Zeroing II (EC)*, on the grounds that the report "did not resolve the issue of whether negotiators of the Anti-Dumping Agreement intended to prohibit zeroing" and that "even if it were to assume that zeroing was permitted under Article VI of the GATT 1947, Article VI of the GATT 1994 has to be interpreted now in conjunction with the relevant provisions of the Anti-Dumping Agreement, such as

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[61] *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts, L/1141, adopted on 27 May 1960, BISD 9S/194, para. 7.

[62] *US – Zeroing (Japan) (Panel),* para. 7.107 and n. 743.

[63] *US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.64.

[64] *US – Stainless Steel (Mexico) (AB)*, para. 131.

Articles 2.1, 2.4, 2.4.2, and 9.3."[65] It is significant, however, that the AD Agreement was negotiated against the background of the GATT 1947, the Antidumping Code, and the antidumping investigation methodologies of individual Contracting Parties. The Experts Report demonstrates that historically dumping was understood in relation to individual transactions, which provides the context against which the AD Agreement was negotiated. Moreover, if GATT 1947 indeed prohibited calculation of transaction-specific margins, it would have been illogical for the Group of Experts, who carefully considered the issues in the application of GATT 1947, to conclude that the calculation of transaction-specific margins was an "ideal method." The Group of Experts understanding is further reinforced by the fact that the methodology of not offsetting dumping based on comparisons where the export price was greater than normal value was examined by two GATT panels and was found to be consistent with the Antidumping Code.[66]

72. It is also significant that Article VI of GATT 1947 was incorporated into GATT 1994 without revisions.[67] The Uruguay Round negotiators actively discussed whether the use of "zeroing" should be restricted.[68] The text of Article VI of the GATT 1947, however, did not change as a result of the Uruguay Round agreements.[69] The normal inference one draws from the absence of a change in language is that the drafters intended no change in meaning.[70] Although the Appellate Body has concluded that the proposals to restrict zeroing reflected the position of some, but not all of negotiating parties,[71] this conclusion does not detract from the fact that such proposals were not adopted and the text of Article VI of the GATT 1947 did not change as a

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[65] *US – Zeroing II (EC) (AB)*, para. 300.

[66] *See*, *e.g.*, *EC – Audiocassettes,* para. 360; *EC – Cotton Yarn*, para. 502.

[67] *See* GATT 1994, para. 1(a).

[68] *See, e.g., Communication from Japan*, MTN.GNG/NG8/W/30 (20 June 1988), item I.4(3), in which Japan expressed concern about a methodology wherein "negative dumping margins, i.e., the amount be which export price exceeds normal value, are ignored."; *Proposed Elements for a Framework for Negotiations: Principles and Objectives for Anti-dumping Rules, Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (Oct. 13, 1989), at item II.E.(d) (proposing that in calculating dumping margins "'negative' dumping should be taken into account, i.e. if certain transactions are sold for more than the normal value in the foreign market, that excess should be balanced off against sales of merchandise at less than normal value"); *Communication from the Delegation of Hong Kong,* MTN.GNG/NG8/W46 (July 3, 1989), at 7.

[69] Similarly, the text of Article 2.1 of the AD Agreement mirrors the text of the Tokyo Round Antidumping Code.

[70] Instructive in this regard is *US – Underwear (AB)*, p. 15, in which the Appellate Body found that the disappearance in the *Agreement on Textiles and Clothing* of the earlier *Multi-Fibre Agreement* provision for backdating the operative effect of a restraint measure, "strongly reinforced the presumption that such retroactive application is no longer permissible." The corollary, however, is that when a provision is not changed, there is a presumption that behavior that previously was permissible remains permissible.

[71] *US – Zeroing II (EC) (AB)*, para. 303.

result of the Uruguay Round Agreements. If the negotiators of the Uruguay Round Agreements indeed intended to make such a fundamental change in the meaning of "margin of dumping," they would have been more clear about it, and it would not have come as a surprise to the major users of dumping remedies, such as the EU and the United States, after the fact through dispute settlement.

(c) The Term "Product" Does Not Refer Exclusively to "Product as a Whole"

73. Brazil's claims in this dispute depend on its assertion that "the Appellate Body concluded that the concepts of 'dumping' and 'margins of dumping' are defined in relation to a product under investigation as a whole, encompassing all of the export transactions of the product pertaining to an investigated exporter, and they cannot be found to exist only for a type, model, or category of that product."[72] This conclusion is contrary to the ordinary meaning of the text of the relevant provisions of the AD Agreement, the Antidumping Code, the GATT 1947, and the GATT 1994 (as well as the evidence indicating that the concepts of dumping and margin of dumping have long been understood as relating to individual transactions, including the report of the Group of Experts, the reports of the GATT panels, the well-established practice of Members using antidumping regimes, and the negotiating history of the AD Agreement). Article 2.1 of the AD Agreement and Article VI of the GATT 1994 do not define the terms "dumping" and "margin of dumping" such that export transactions must necessarily be examined at an aggregate level.

74. Brazil's claims in this dispute depend on a contrary interpretation of these provisions holding that "dumping" and "margins of dumping" relate solely, and exclusively, to the "product as a whole."[73] Brazil relies upon several Appellate Body reports in support of its interpretation, and ultimately depends on the reasoning set forth in the Appellate Body reports in *US – Zeroing (EC), US – Zeroing (Japan)* and *US – Stainless Steel (Mexico)*, and *US – Zeroing II (EC)*,[74] which rejected the notion that dumping may occur with respect to an individual transaction.

75. However, the term "product as a whole" does not appear in the text of the AD Agreement, and this interpretation denies that the ordinary meaning of the word "product" or

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[72] Brazil's First Written Submission, para. 60.

[73] *See* Brazil's First Written Submission, para. 63.

[74] With respect to the other cases cited by Brazil, in *US – Corrosion Resistant Steel Sunset Review*, no Article 9.3 assessment proceeding was challenged as a measure, and the report does not even mention the term "product as a whole." Rather, the Appellate Body stated that if an investigating authority choose to rely upon dumping margins in making its likelihood of dumping determination in an Article 11 sunset review, such margins must be calculated consistent with Article 2.4 of the AD Agreement. In *EC – Bed Linen (AB)* and *US – Softwood Lumber Dumping (AB)*, a zeroing prohibition was found in the context of the average-to-average comparison methodology in investigations, where a textual basis for an obligation to provide offsets, when using that particular methodology in an investigation, was present.

"products" used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 admits of a meaning that is transaction-specific. As the panel report in *US – Zeroing (Japan)* explained, "'[T]here is nothing inherent in the word 'product[]' (as used in Article VI:1 of the GATT 1994 and Article 2.1 of AD Agreement) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis . . . .'"[75]

76. As noted above, the report in *US – Softwood Lumber Dumping (AB)* reasoned that zeroing was not permitted in the context of "multiple averaging," on the basis of the phrase "all comparable export transactions," but did not explain how zeroing could be prohibited in the context of "multiple comparisons" generally. In *US – Zeroing (EC) (AB)*, the "product as a whole" concept led to the conclusion that zeroing is prohibited whenever "multiple comparisons" are made. The phrases "product as a whole" and "multiple comparisons" do not appear in the AD Agreement; they were derived from interpretations based on the phrase "all comparable export transactions," which appears only in connection with average-to-average comparisons in investigations. In considering this, the panel in *US – Zeroing (Japan)* found

> no explanation of this shift from the use of the "product as a whole" concept as context to interpret the term "margins of dumping" in the first sentence of Article 2.4.2 of the AD Agreement in connection with multiple averaging, on the one hand, to the use of this concept as an autonomous legal basis for a general prohibition of zeroing, on the other. In this regard, we note, in particular, that the Appellate Body does not discuss why the fact that in the context of multiple averaging the terms 'dumping' and 'margins of dumping' cannot apply to a *sub-group* of a product logically leads to the broader conclusion that Members may not distinguish between *transactions* in which export prices are less than normal value and *transactions* in which export prices exceed normal value.[76]

77. In *US – Stainless Steel (Mexico),* the Appellate Body stated that dumping cannot be determined at the level of individual export transactions:

> [T]he *notion* that a "product is introduced into the commerce of another country at less than its normal value" . . . *suggests* to us that the determination of dumping with respect to an exporter is properly made not at the level of individual export transactions, but on the basis of the totality of an exporter's transactions of the subject merchandise over the period of investigation.[77]

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[75] *US – Zeroing (Japan) (Panel)*, para. 7.105 (quoting *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, n. 32); *see also US - Zeroing (Mexico) (Panel)*, para. 7.119; *see also US – Zeroing II (EC) (Panel)*, paras. 7.163-7.169 (substantively agreeing with the prior panels, but erroneously rejecting otherwise permissible interpretation solely on the basis of a conflicting interpretation developed in certain Appellate Body reports).

[76] *US – Zeroing (Japan) (Panel)*, para. 7.101.

[77] *US – Stainless Steel (Mexico) (AB)*, para. 98 (emphasis added).

The United States respectfully disagrees with this conclusion, however. This reasoning does not cite to any actual text that directs the calculation of a margin of dumping to occur at the level of multiple transactions, nor any text that would preclude the calculation of a margin of dumping from occurring at a transaction-specific level. The ordinary meaning of the text of Article VI:1, read in context, does not support the conclusion that the only interpretation of Article VI:1 is one that precludes the calculation of margins of dumping on a transaction-specific basis. After all, as explained above, any one individual transaction introduces a product into commerce.

78. In *US – Stainless Steel (Mexico)*, the Appellate Body stated further that it could not see how to reconcile the possibility of a transaction-specific meaning for the terms "margin of dumping" and "dumping" with various provisions of the AD Agreement.[78] However, this conclusion depends upon a definition on the terms "dumping" and "margin of dumping" that ignores the ordinary meaning of the word "product," which can have either a transaction-specific meaning, or collective meaning, or both. The definitions of these terms, used in a wide variety of contexts throughout the provisions of GATT 1994 and the AD Agreement, incorporate a flexibility of meaning that derives from the fact that the term "product" ordinarily has a meaning that is either collective or transaction-specific and that permits these terms to be understood based on the context in which they are used.[79]

79. Examination of the term "product" as used throughout the AD Agreement and the GATT 1994 demonstrates that the term "product" in these provisions does not exclusively refer to "product as a whole." Instead, "product" can have either a collective meaning or an individual meaning. For example, Article 2.6 of the AD Agreement – which defines the term "like product" in relation to "the product under consideration" – plainly uses the term "product" in the collective sense. By contrast, Article VII:3 of the GATT 1994 – which refers to "[t]he value for customs purposes of any imported product" – plainly uses the term "product" in the individual sense of the object of a particular transaction (*i.e.*, a sale involving a specific quantity of merchandise that matches the criteria for the "product" at a particular price). Therefore, it cannot be presumed that the same term has such an exclusive meaning when used in Article 2.1 of the AD Agreement and Article VI of the GATT 1994.

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[78] *US – Stainless Steel (Mexico) (AB)*, para. 99.

[79] The implications of a contrary interpretation are difficult to reconcile with any plausible understanding of the AD Agreement. In particular, there seems to be no temporal limit to the extent of the obligation to continue aggregating comparison results. Nothing in the text of the relevant provisions of the AD Agreement specifies the applicable time period as being the period of investigation, nor does the text specify the period to be used after an antidumping measure has been imposed – for example, for purposes of an Article 9.3 review. Any attempt to set an end date to the obligated aggregation would appear to arbitrarily subdivide the "product as a whole" such that subsequent non-dumped transactions may be "zeroed" due to the fact they would be precluded from offsetting current antidumping duty liability. Indeed, it would seem to require that no margin could be determined until all imports had ceased permanently or the order had been withdrawn. This is clearly contrary to the intent of Article VI of the GATT 1994 that antidumping duties would be a remedy to offset or prevent injurious dumping.

80. As the panel in *US – Softwood Lumber Dumping (Article 21.5)* explained, "an analysis of the use of the words product and products throughout the *GATT 1994*, indicates that there is no basis to equate product with 'product as a whole'. . . . Thus, for example, when Article VII:3 of the GATT refers to 'the value for customs purposes of any imported product', this can only be interpreted to refer to the value of a product in a particular import transaction."[80] The panel detailed numerous additional instances where the term "product," as used in the AD Agreement and GATT 1994, do not support a meaning that is solely, and exclusively, synonymous with "product as a whole":

> To extend the Appellate Body's reference to the concept of "product as a whole" in the sense that Canada proposes to the T-T methodology would entail accepting that it applies throughout Article VI of *GATT 1994*, and the *AD Agreement*, wherever the term "product" or "products" appears. A review of the use of these terms does not support the proposition that "product" must always mean the entire universe of exported product subject to an anti-dumping investigation. For instance, Article VI:2 states that a contracting party "may levy on any dumped product" an anti-dumping duty. Article VI:3 provides that "no countervailing duty shall be levied on any product". Article VI:6(a) provides that no contracting party shall levy any anti-dumping or countervailing duty on the importation of any product...". Similarly, Article VI:6(b) provides that a contracting party may be authorized "to levy an anti-dumping or countervailing duty on the importation of any product". Taken together, these provisions suggest that "to levy a duty on a product" has the same meaning as "to levy a duty on the importation of that product". Canada's position, if applied to these provisions, would mean that the phrase "importation of a product" cannot refer to a single import transaction. In many places where the words product and products are used in Article VI of the GATT 1994, an interpretation of these words as necessarily referring to the entire universe of investigated export transactions is not compelling.[81]

81. In sum, the terms "product" and "products" cannot be interpreted in such an exclusive manner so as to deprive them of one of their ordinary meanings, in particular the "product" or "products" that are the subject of individual transactions. Therefore, the words "product" and "products" as they appear in Article 2.1 of the AD Agreement and Article VI of the GATT 1994 cannot be understood to provide a textual basis for an interpretation that requires margins of dumping established in relation to the "product" to be established on an aggregate basis for the "product as a whole."

82. Likewise, examination of the term "margins of dumping" itself provides no support for Brazil's interpretation of the term as solely, and exclusively, relating to the "product as a whole."

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[80] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, n. 36; *see also* para. 5.23.

[81] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.23 (footnotes omitted).

In examining the text of Article VI:2 of the GATT 1994, the panel in *US – Softwood Lumber Dumping (Article 21.5)* observed:

> Article VI:2 of the GATT 1994 provides that, for the purposes of Article VI, "the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1" of Article VI. Paragraph 1 of Article VI defines dumping as a practice "by which products of one country are introduced into the commerce of another country at less than the normal value of the products" (emphasis supplied). . . . Article VI:1 provides that "a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product in the exporting country" (emphasis supplied). In other words, there is dumping when the export "price" is less than the normal value. Given this definition of dumping, and the express linkage between this definition and the phrase "price difference", it would be permissible for a Member to interpret the "price difference" referred to in Article VI:2 as the amount by which the export price is less than normal value, and to refer to that "price difference" as the "margin of dumping".[82]

Thus, the panel saw "no reason why a Member may not . . . establish the 'margin of dumping' on the basis of the total amount by which transaction-specific export prices are less than the transaction-specific normal values."[83] Although the panel was examining margins of dumping in the context of the transaction-to-transaction comparison method in investigations under Article 2.4.2, its reasoning is equally applicable to margins of dumping established on a transaction-specific basis in an assessment proceeding under Article 9.3.

83. Additionally, the term "margin of dumping," as used elsewhere in the GATT 1994 and the AD Agreement, does not refer exclusively to the aggregated results of comparisons for the "product as a whole." As used in the Note Ad Article VI:1, which provides for importer-specific price comparisons, the term "margin of dumping" cannot relate to aggregated results of all comparisons for the "product as a whole" because an exporter or foreign producer may make export transactions using multiple importers. Similarly, the term "margin of dumping" as used in Article 2.2 of the AD Agreement would require the use of constructed value for the "product as a whole," even if the condition precedent for using constructed value under Article 2.2 relates only to a portion of the comparisons. The panel in *US – Softwood Lumber Dumping (21.5)* observed that this "would run counter to the principle that constructed normal value is an alternative to be used only in the limited circumstances provided for in Article 2.2. . . . We are

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[82] *US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.27 (footnote omitted).

[83] *US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.28 (emphasis in original).

not convinced that the Appellate Body could have intended its *US – Softwood Lumber Dumping* findings to be applied in this manner".[84]

84. In *US – Zeroing II (EC)*, the Appellate Body acknowledged that the text of Article 2.1 of the AD Agreement itself does not preclude the possibility of establishing margins of dumping on a transaction-specific basis: "Mere scrutiny of the particular terms – such as "product" and "export price" – in Article 2.1 does not resolve the issue of whether the concept of dumping is concerned with individual transactions or whether it necessarily an aggregated concept attributable to an exporter."[85] In doing so, the Appellate Body rejected the notion that the text of Article 2.1 of the AD Agreement is clear as to what whether "dumping" or "margin of dumping" could be found solely at a level of individual transactions or solely at the aggregate level of all transactions, or both.

(d) Brazil's Argument That "Dumping" and "Margin of Dumping" Are Exporter Related Concepts Does Not Preclude Interpretation of Dumping in Relation to Individual Transactions of an Exporter

85. Referencing several provisions of the AD Agreement and Appellate Body reports, Brazil argues that "'dumping' and 'margin of dumping' are exporter-related concepts."[86] However, this dispute is not over whether dumping is an exporter-related or importer-related concept, but rather if, and to what extent, individual transactions of a particular exporter must be aggregated. Indeed, individual transactions are exporter-specific. There is no discrepancy: dumping may be both exporter-specific and transaction-specific at the same time.

86. An exporter-orientation does not, of itself, require that transactions be aggregated under Article 9.3 because a dumping margin determined on the basis of an exporter's action with respect to an individual transaction is no less exporter-specific than one determined on the basis of multiple transactions by that exporter. A transaction-specific meaning is equally exporter-specific and importer-specific since each transaction has both an exporter and an importer. Because of the textual ambiguity with respect to the issue of aggregation, the definitions of "dumping" and "margin of dumping" are flexible and may have different applications in different contexts. In the context of Article 9.3 proceedings, which govern antidumping duty assessments that are applied to individual entries of the subject merchandise introduced into the commerce of the importing country on a transaction-by-transaction basis, it is permissible to interpret "margin of dumping" as being transaction-specific and not relating to an aggregation of transactions.

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[84] *US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.62.

[85] *US – Zeroing II (EC) (AB)*, para. 282.

[86] Brazil's First Written Submission, para 54.

(e) Brazil's Argument That "Dumping" Must Cause or Threaten Injury Does Not Preclude Interpretation of Dumping in Relation to Individual Transactions

87. Brazil argues that "the Anti-Dumping Agreement and GATT 1994 are not concerned with dumping per se, but with dumping that causes or threatens to cause material injury to the domestic industry."[87] Brazil further states that Article 3.1 stipulates that a determination of injury shall be based on an objective examination of both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products.[88] In Brazil's view, "injury cannot be found to exist in relation to an individual transaction, but only for the *product as a whole*."[89]

88. Brazil's attempt to tie an obligation to provide offsets to the determination of injury actually reinforces the interpretation that any such obligation would properly be limited to the use of the average-to-average comparison methodology in an investigation, the proceeding where the determination of material injury or threat of material injury occurs. As explained above, in *US – Softwood Lumber Dumping (AB),* the Appellate Body specifically recognized that the issue before it was whether "zeroing" was prohibited under the average-to-average comparison methodology found in Article 2.4.2.[90] The report found only that "zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology."[91] The Appellate Body reached this conclusion by interpreting the terms "margins of dumping" and "all comparable export transactions" as they are used in Article 2.4.2 in an "integrated manner."[92] In other words, the term "all comparable export transactions" was integral to the interpretation that the multiple comparisons of average normal value and average export price for averaging groups did not constitute an average-to-average comparison of all comparable export transactions unless the results of all such comparisons were aggregated. The obligation to provide offsets, therefore, was tied to the text of the provision addressing the use of the average-to-average comparison methodology in an investigation, and did not arise out of any independent obligation to offset prices.

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[87] Brazil's First Written Submission, para. 58.

[88] Brazil's First Written Submission, para. 58.

[89] Brazil's First Written Submission, para. 58.

[90] *US – Softwood Lumber Dumping (AB)*, paras. 104, 105, and 108.

[91] *US – Softwood Lumber Dumping (AB)*, para. 108.

[92] *US – Softwood Lumber Dumping (AB)*, paras. 86 - 103.

89. In contrast to investigations, Article 9.3 duty assessment proceedings do not address the existence or threat of material injury. Duty assessment proceedings under Article 9.3 are distinct from both Article 5 investigations and Article 11 reviews, as provided for in the AD Agreement. While investigations are conducted to determine the existence, degree and effect of dumping pursuant to Article 5.1, assessment proceedings are conducted to determine the final liability for payment of antidumping duties or whether a refund of excess antidumping duties is owed pursuant to Article 9.3. While Article 11 provides for different types of reviews ("changed circumstances" reviews and five-year or "sunset" reviews), footnote 21 to Article 11.2 explicitly provides that an Article 9.3 determination does not constitute a review within the meaning of Article 11. Similarly, footnote 22 to Article 11.3 explicitly refers to a proceeding conducted pursuant to Article 9.3.1 as an "assessment proceeding" and not as an investigation or a review.[93]

90. The Appellate Body and prior panels have also found that the provisions in the AD Agreement with express limitations to investigations are, in fact, limited to the investigation phase of a proceeding. In evaluating whether restrictions on cumulation in investigations were equally applicable to sunset reviews, the Appellate Body noted that Article 3.3 of the AD Agreement – like Article 2.4.2 – "plainly speaks to . . . anti-dumping investigations . . . . *It makes no mention of injury analyses undertaken in any proceeding other than original investigations* . . . . [T]he opening text of Article 3.3 plainly limits its applicability to original investigations."[94] Yet Brazil appears to suggest that in the context of Article 9.3 assessment proceedings "injury cannot be found to exist in relation to an individual transaction, but only for the *product as a whole*."[95] Brazil's argument is flawed, however, because no Article 3 injury determination is required in Article 9.3 assessment proceedings. Although Articles 5.6, 5.7, and 5.8 expressly require investigating authorities to consider evidence of injury in conducting Article 5 investigations, there are no identical requirements in Article 9.3 of the AD Agreement with respect to assessment proceedings.

91. The Appellate Body has already recognized that investigations and other proceedings under the AD Agreement serve different purposes and have different functions, and therefore are subject to different obligations under the Agreement.[96] Article 9 assessment proceedings are

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[93] Other provisions of the AD Agreement also recognize a distinction between investigations and assessment proceedings. For example, Article 18.3 of the AD Agreement explicitly recognizes the difference between investigations, which may lead to the imposition of a measure, and "reviews" of existing measures. In *Brazil – Desiccated Coconut (AB)*, the Appellate Body, analyzing an identical distinction in Article 32.3 of the *Agreement on Subsidies and Countervailing Measures*, noted that the imposition of "definitive" duties (an "order" in U.S. parlance) ends the investigative phase. *Brazil – Desiccated Coconut (AB)*, p. 11. *See also US – Lead Bars (AB)*, paras. 53, 61 (distinguishing between Article 21.2 reviews and the original determination in an investigation).

[94] *US – OCTG from Argentina (AB)*, paras. 294, 301 (emphasis added).

[95] Brazil's First Written Submission, para. 58.

[96] *See, e.g.*, *US – Corrosion-Resistant Steel CVD (AB)*, para. 87.

not concerned with the existential question of whether injurious dumping exists above a *de minimis* level such that the imposition of antidumping measures is warranted or with the question whether an injury or threat of material injury exists. These inquiries would have already been resolved in the affirmative in the investigation phase. Instead, Article 9, by its terms, focuses on the amount of duty to be assessed on particular entries, an exercise that is separate and apart from the calculation of an overall dumping margin and determination of injury or threat of material injury during the threshold investigation phase of an antidumping proceeding.

92. Moreover, dumping duties – not above-normal value sales – are designated as the remedy for dumping. To the extent a foreign producer or exporter receives an export price above normal value, it is the foreign producer or exporter itself that receives a benefit. The domestic producers of similar merchandise that are injured by other transactions made at less than fair value are not beneficiaries of their foreign competitor's commercial success. The fact that a remedy in the form of an antidumping duty is only permitted with respect to the unfairly priced transactions does not logically lead to the conclusion that the fairly priced transactions constitute an alternative remedy that may preclude the remedy provided in the agreements. Indeed, there is nothing in the GATT 1994 or the AD Agreement to suggest that dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price. As the panel in *US – Stainless Steel (Mexico)* explained, "the injury suffered by the domestic industry because of dumped imports would not be removed by imports at non-dumped prices."[97]

3. Brazil's Position That a Prohibition on Zeroing Applies Beyond the Context of Average-to-Average Transactions in Investigations is Inconsistent with Article 2.4.2 of the AD Agreement

93. A general prohibition of zeroing that applies beyond the context of average-to-average comparisons in investigations would be inconsistent with the text of Article 2.4.2, which provides for an exceptional methodology that may be used in certain circumstances. The methodology was drafted as an exception to the obligation to engage in symmetrical comparisons in an investigation. By the terms of Article 2.4.2, it may be used "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods . . . ." When the investigating authority provides an explanation as to why these "differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison," it may then use the asymmetrical average-to-transaction comparison to establish the existence of margins of dumping during the investigation phase.

94. The mathematical implication of a general prohibition of zeroing, however, is that the exceptional clause would be reduced to inutility. That is because the exceptional methodology,

[97] *US – Stainless Steel (Mexico) (Panel),* para. 7.147.

provided for in Article 2.4.2, mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons.[98] In this respect, a general zeroing prohibition would render the exception in Article 2.4.2 a complete nullity. Such an interpretation would be disfavored under a key tenet of customary rules of treaty interpretation, namely that an "interpretation must give meaning and effect to all the terms of a treaty."[99]

95. In *US – Zeroing (EC)*, *US – Softwood Lumber Dumping (Article 21.5), US – Zeroing (Japan)*, and *US – Stainless Steel (Mexico)*, each of the panels recognized that the customary rules of interpretation of public international law precluded an interpretation that rendered the second sentence of Article 2.4.2 redundant.[100] The panel in *US – Zeroing (EC)* found that a general prohibition of zeroing that applied to the exceptional methodology "would deny the second sentence [of Article 2.4.2] the very function for which it was created."[101] The fact that, under a general zeroing prohibition, the average-to-average comparison method and the average-to-transaction comparison method would yield identical results was recognized by each of the panels.[102]

96. Despite the findings of the panels that the results of the exceptional methodology under Article 2.4.2 "will necessarily always yield a result identical to that of an average-to-average

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[98] The reason for this is that, if offsetting is required, then all non-dumped sales (i.e., negative values) will offset the margins on all of the dumped sales (*i.e.*, positive values). It makes no difference mathematically whether the calculation of the final overall dumping margin is based on comparing weighted-average export prices to weighted-average normal values or on comparing transaction-specific export prices to weighted-average normal values. In both cases, the sum total of the positive values will be offset by the sum total of the negative values, and the results will be the same.

[99] *US – Gasoline (AB)*, p. 23.

[100] *US – Zeroing (EC) (Panel),* para. 7.266, *US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.52, *US – Zeroing (Japan) (Panel),* para. 7.127.*US – Stainless Steel (Mexico) (Panel)*, para. 7.134.

[101] *US – Zeroing (EC) (Panel),* para. 7.266, *see also US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.52 ("[A] general prohibition of zeroing . . . would deprive the second sentence of Article 2.4.2 of effect."); *US – Zeroing (Japan) (Panel),* para. 7.127 ("If zeroing is prohibited in the case of the average-to-transaction comparison, the use of this method will necessarily always yield a result identical to that of an average-to-average comparison."); *US - Zeroing (Mexico) (Panel)*, para. 7.134 (stating that "a general prohibition of zeroing cannot be reconciled with the existence of the third comparison methodology (WA-T) under Article 2.4.2.").

[102] *US – Zeroing (EC) (Panel),* para. 7.266 ("In fact, under such an interpretation the alternative asymmetrical comparison methodology would as a matter of mathematics produce a result that was *identical* to that of the first, average-to-average, methodology."); *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.76 ("[A] prohibition of zeroing under the targeted dumping comparison methodology ... would result in a margin of dumping mathematically equivalent to that established under W-W comparison methodology."); *US – Zeroing (Japan) (Panel),* para. 7.127, n. 763 ("Mathematically, if zeroing is prohibited under the average-to-transaction method, the sum total of amount by which export prices are above normal value will offset the sum total of the amounts by which export prices are less than normal value.").

comparison"[103] under a general prohibition of zeroing, the Appellate Body has found this concern to be "overstated."[104] The Appellate Body has asserted that mathematical equivalence will occur only in "certain situations"[105] and represents "a non-tested hypothesis".[106] This objection is not persuasive, however. The panels have specifically addressed all of the situations under which it was argued that mathematical equivalence would not obtain and found these situations did not represent methodologies consistent with the AD Agreement.[107] The second sentence of Article 2.4.2 is rendered inutile if the only alternative methodologies that do not result in mathematical equivalence are, themselves, not consistent with the AD Agreement.

97. In *US – Zeroing (Japan)*, the Appellate Body dismissed the redundancy caused by mathematical equivalence by concluding that it may be permissible to apply the exceptional methodology to a subset of export transactions.[108] The language of the AD Agreement says nothing about selecting a subset of transactions when conducting an analysis under the second sentence of Article 2.4.2. The Appellate Body has drawn its conclusions about "zeroing" from its interpretation of "dumping" as relating to a "product," *i.e.*, a "product as a whole." The exception provides that when certain conditions are met, Members are permitted to compare average normal values to transaction-specific export prices. If the Appellate Body is correct that dumping may only be determined for the product as a whole (which the United States does not concede), there is no textual basis for inferring that the comparison methodology in the second sentence of Article 2.4.2 is an exception to that provision (which, as Article 2.1 provides, applies throughout the AD Agreement). The second sentence of Article 2.4.2 simply provides an exception to the average-to-average or transaction-to-transaction comparison requirement of the first sentence of Article 2.4.2. Consequently, the use of a subset of export transactions as a means of avoiding mathematical equivalency would also appear to be inconsistent with the AD Agreement.

98. The redundancy of the second sentence of Article 2.4.2 occurs as a consequence of any interpretation that results in a general prohibition of zeroing, whether derived from the definitional language of Article 2.1 of the AD Agreement and Article VI of the GATT 1994 or otherwise. Accordingly, the Panel should summarily reject any contention that zeroing is necessarily prohibited in all contexts under all comparison methodologies, including with

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[103] *US – Zeroing (Japan) (Panel),* para. 7.127.

[104] *US – Softwood Lumber Dumping (Article 21.5) (AB),* para. 100.

[105] *US – Zeroing (Japan) (AB),* para. 133.

[106] *US – Softwood Lumber Dumping (Article 21.5) (AB),* para. 97.

[107] *See, US – Zeroing (Japan) (Panel)*, paras. 7.127-7.137; *US – Zeroing (EC) (Panel)*, para. 7.266; *US – Softwood Lumber Dumping (Article 21.5) (Panel),* paras. 5.33-5.52.

[108] *US – Zeroing (Japan) (AB),* para. 135.

respect to assessment proceedings. "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[109]

4. Brazil Has Not Demonstrated Any Inconsistency with Article 9.3 of the AD Agreement or Article VI:2 of the GATT

99. Brazil has not demonstrated any inconsistency with Article 9.3 of the AD Agreement or Article VI:2 of the GATT. Article 9 of the AD Agreement relates, as its title indicates, to the imposition and collection of antidumping duties. Brazil's claim with respect to assessment proceedings under Article 9.3 of the AD Agreement and Article VI:2 of the GATT is that the amount of the antidumping duty has exceeded the margin of dumping established under Article 2.[110] This claim depends entirely on a conclusion that the interpretation of Article 2.1 of the AD Agreement and Article VI of the GATT detailed above is not permissible,[111] and that Brazil's preferred interpretation of the "margin of dumping," which precludes any possibility of transaction-specific margins of dumping, is the only permissible interpretation of this term as used in Article 9.3 of the AD Agreement. In Brazil's view, a Member breaches Article 9.3 and Article VI:2 by failing to provide offsets, because Members are required to calculate margins of dumping on an exporter-specific basis for the product *"as a whole"* and, consequently, a Member is required to aggregate the results of *"all" "intermediate comparisons,"* including those for which the export price exceeds the normal value.[112] The United States notes that the terms upon which Brazil's interpretation rests are conspicuously absent from the text of both Articles 2.1 and 9.3 and Article VI:2. Brazil's interpretation is not mandated by the definition of dumping contained in Article 2.1, as described in detail above.

100. As set forth in this section, the text and context of Article 9.3 also indicate that Brazil's interpretation of the obligation set forth in Article 9.3 is erroneous. In particular, Article 9.3 states that the "amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." For the reasons set forth in detail above, the term "margin of dumping," as defined in Article 2.1 of the AD Agreement and Article VI of the GATT 1994, may be applied to individual transactions. This understanding of the term "margin of dumping" is particularly appropriate in the context of antidumping duty assessment. In the real world of administering antidumping regimes, the individual transactions are both the means by which

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[109] *US – Gasoline (AB)*, p. 23.

[110] Brazil's First Written Submission, para. 62.

[111] As noted above, the Appellate Body has explained that Article 2.1 of the Antidumping Agreement and Article VI:1 of GATT 1994 are merely definitional provisions and on their own "do not impose independent obligations." *US – Zeroing (Japan) (AB)*, para. 140. Accordingly, to the extent Brazil is claiming that the challenged measures are inconsistent with "obligations" found in Article 2.1 or Article VI:1, Brazil has failed to establish the existence of any obligations pursuant to those definitional provisions and, therefore, Brazil's claims should be rejected.

[112] Brazil's First Written Submission, para. 65, 69.

less than fair value prices are established and the mechanism by which the object of the transaction (i.e., the "product") is "introduced into the commerce of the importing country." Likewise, antidumping duties are assessed on individual entries resulting from those individual transactions. Therefore, the obligation set forth in Article 9.3 to assess no more in antidumping duties than the margin of dumping, is similarly applicable at the level of individual transactions.

101. All panels that examined this issue agreed with this interpretation. As the panel in *US – Zeroing (EC)* correctly concluded, there is "no textual support in Article 9.3 for the view that the AD Agreement requires an exporter-oriented assessment of antidumping duties, whereby, if an average normal value is calculated for a particular review period, the amount of anti-dumping duty payable on a particular transaction is determined by whether the overall average of the export prices of all sales made by an exporter during that period is below the average normal value."[113] This does not constitute a denial that dumping is exporter-specific; for the reasons already stated, transaction-specific margins of dumping are exporter-specific. Rather the panel recognized that averaging of export prices was not required to calculate a margin of dumping under Article 9.3. Accordingly, the panel found no basis in Article 9.3 for mandating aggregation of transaction-specific dumping margins in a manner that replicates an overall comparison of export prices on average with the average normal value. The panel in *US – Zeroing (Japan)* similarly rejected the conclusion that the "margin of dumping under Article 9.3 must be determined on the basis of an aggregate examination of export prices during a review period in which export prices above the normal value carry the same weight as export prices below the normal value . . . ."[114]

102. In *US – Zeroing (Japan)*, the panel found that "there are important considerations specific to Article 9 of the AD Agreement that lend further support to the view that it is permissible . . . to interpret Article VI of the GATT 1994 and relevant provisions of the AD Agreement to mean that there is no general requirement to determine dumping and margins of dumping for the product as a whole, which, by itself or in conjunction with a requirement to establish margins of dumping for exporters or foreign producers, entails a general prohibition of zeroing."[115] In particular, the panel explained that such a requirement is inconsistent with the importer-and import-specific obligation to pay an antidumping duty:

> In the context of Article 9.3, a margin of dumping is calculated for the purpose of determining the *final liability for payment of anti-dumping duties* under Article

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[113] *US – Zeroing (EC) (Panel)*, para. 7.204 ("In our view, if the drafters of the AD Agreement had wanted to impose a uniform requirement to adopt an exporter oriented-method of duty assessment, which would have entailed a significant change to the practice and legislation of some participants in the negotiations, they might have been expected to have indicated this more clearly.").

[114] *US – Zeroing (Japan) (Panel)*, para. 7.199. The panel in *US – Zeroing (EC)* expressed essentially the same view. *US – Zeroing (EC) (Panel)*, paras. 7.204 - 7.207 and 7.220-7.223.

[115] *US – Zeroing (Japan) (Panel)*, para. 7.196.

> 9.3.1 or for the purpose of determining *the amount of anti-dumping duty* that must be *refunded* under Article 9.3.2. An anti-dumping duty is paid by an importer in respect of a particular import of the product on which an anti-dumping duty has been imposed. An importer does not incur liability for payment of an anti-dumping duty in respect of the totality of sales of a product made by an exporter to the country in question but only in respect of sales made by that exporter to that particular importer. Thus, the obligation to pay an anti-dumping duty is incurred on an *importer*-and *import*-specific basis. Since the calculation of a margin of dumping in the context of Article 9.3 is part of a process of assessing the amount of duty that must be paid or that must be refunded, this importer- and import-specific character of the payment of anti-dumping duties must be taken into account in interpreting the meaning of "margin of dumping."[116]

103. Similarly, the panel in *US – Zeroing (EC)* explained:

> In our view, the fact that in an assessment proceeding in Article 9.3 the margin of dumping must be related to the liability incurred in respect of particular import transactions is an important element that distinguishes Article 9.3 proceedings from investigations within the meaning of Article 5. . . . [I]n an Article 9.3 context the extent of dumping found with respect to a particular exporter must be translated into an amount of liability for payment of anti-dumping duties by importers in respect of specific import transactions.[117]

104. In *US – Stainless Steel (Mexico)*, the panel also properly took into account the transaction-specific character of Article 9.3 assessment proceedings:

> We note that the obligation to pay anti-dumping duties is not incurred on the basis of a comparison of an exporter's total sales, but on the basis of an individual sale between the exporter and its importer. It is therefore a transaction-specific liability. This importer-specific or transaction-specific character of the payment of anti-dumping duties has, therefore, to be taken into consideration in interpreting Article 9.3.[118]

105. The panels' understanding of Article 9.3 is, at a minimum, a permissible interpretation of the provision. So long as the margin of dumping is understood to apply at the level of

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[116] *US – Zeroing (Japan) (Panel)*, para. 7.198 - 7.199 (emphasis in the original).

[117] *US – Zeroing (EC) (Panel),* para. 7.201.

[118] *US – Stainless Steel (Mexico) (Panel)*, para. 7.124. In *US – Zeroing II (EC) (Panel)*, para. 7.163, the panel found this reasoning persuasive, but also found that the Appellate Body disagreed with this persuasive reasoning.

individual transactions there is absolutely no tension between the exporter-specific concept of dumping as a pricing behavior and the importer-specific remedy of payment of dumping duties. It is only when an obligation to aggregate transactions under Article 9.3 is improperly inferred that any perception of conflict arises. Indeed, Brazil's interpretation of "margin of dumping" as used in Article 9.3, if applied, would fundamentally alter the antidumping practices of numerous Members using this remedy and render many of these systems difficult, if not impossible, to administer. In particular, under Brazil's interpretation of Article 9.3, antidumping duties would be prevented from fulfilling their intended purpose under Article VI:2 of the GATT 1994, because importers that contribute the most to injurious dumping would be favored over other importers (and domestic competitors) that price fairly, and prospective normal value systems would be rendered retrospective, as described further below.

106. Although, as stated by the Appellate Body in *US - Zeroing (Japan),* dumping involves differential pricing behavior of exporters or producers between its export market and its normal value,[119] dumping nevertheless occurs at the level of individual transactions. Moreover, the remedy for dumping provided for in Article VI:2 of GATT 1994, *i.e.*, antidumping duties, are applied at the level of individual entries for which importers incur the liability. In this way, the importer can be motivated to raise resale prices to cover the amount of the antidumping duty, thereby preventing the dumping from having further injurious effect. If instead, the amount of the antidumping duty must be reduced to account for the amount by which some other transaction was sold at above normal value, possibly involving an entirely different importer, then the antidumping duty will be insufficient to have such a remedial effect. The importer of the dumped product would remain in a position to profitably resell the product at a price that continues to be injuriously dumped. For this reason, if Brazil's interpretation of the margin of dumping is adopted as the sole permissible interpretation of Article 9.3, the remedy provided under the AD Agreement and the GATT 1994 will be prevented from addressing injurious dumping.

107. These concerns led the panel in *US – Zeroing (Japan)* to reject the same interpretation that Brazil offers in this dispute. The panel observed that the implication of this interpretation was that Members with retrospective assessment systems "may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value."[120] The panel found that this result was not supported by the text of Article 9.3, which "contains no language requiring such an aggregate examination of export transactions in determining final liability for payments of antidumping duties . . . ."[121]

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[119] *US – Zeroing (Japan) (AB)*, para. 156.

[120] *US – Zeroing (Japan) (Panel)*, para. 7.199.

[121] *US – Zeroing (Japan) (Panel)*, para. 7.199.

108. It also follows that if a Member is unable to calculate and assess the duties on a transaction-specific basis, importers of the merchandise for which the amount of dumping is greatest will actually have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports. Indeed, even if one were not to impose duties on importers whose entries were not responsible for the finding of dumping, the importers of non-dumped merchandise would still be significantly disadvantaged because the importers of dumped merchandise would still have a cost advantage, as the duties they pay on the dumped merchandise would be reduced by the amount by which the non-dumped merchandise exceeded normal value.[122]

109. In addition, Brazil's interpretation of Article 9.3, requiring that antidumping duty liability be determined for the product "as a whole," is inconsistent with the specific provision in Article 9 that recognizes the existence of prospective normal value systems of assessment. Article 9.4(ii) of the AD Agreement "expressly refers to the calculation of the liability for payment of antidumping duties on the basis of a prospective normal value system."[123] Under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value.[124] For example, an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payments of antidumping duties. The converse is also true. A liability for a

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[122] As the panel in *US – Softwood Lumber Dumping (Article 21.5)* observed, the perverse incentives created by providing offsets also arise in the context of prospective assessment systems:

> [An] obligation to take all (including non-dumped) comparisons into account in determining the margin of dumping for the product as a whole ... is illogical, as it would provide importers clearing dumped transactions with a double competitive advantage *vis-à-vis* other importers: first, they would benefit from the lower price inherent in a dumped transaction; second, they would benefit from offsets, or credits, "financed" by the higher prices paid by other importers clearing non-dumped, or even less-dumped, transactions. . . .
>
> Again, this makes no sense in the context of a prospective normal value duty assessment system, because . . . the "margin of dumping" at issue is a transaction-specific price difference calculated for a specific import transaction. And if other comparisons for the product as a whole were somehow relevant, offsets would have to be provided for non-dumped transactions, with the result that one importer could request a refund on the basis of a margin of dumping calculated by reference to non-dumped transactions made by other importers. We are unable to accept that the Appellate Body could have intended such absurd results to follow from its interpretation of the phrase "margins of dumping" in *US - Softwood Lumber V*.

US – Softwood Lumber Dumping (Article 21.5) (Panel), paras. 5.54-5.57.

[123] *US – Zeroing (Japan) (Panel)*, para. 7.201.

[124] *US – Zeroing (Japan) (Panel)*, para. 7.201; *see also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53.

dumped sale would be determined by comparing the price of the individual export transaction with prospective normal value and the prices of other transactions have no relevance to this determination.[125] As the panel in *US – Zeroing (Japan)* found, "[t]here is no textual support in Article 9 for the proposition that export prices in other transactions are of any relevance in this respect."[126]

110. In *US – Stainless Steel (Mexico)*, the panel reached the same conclusion. Specifically, the panel explained:

> Article 9.4(ii) clearly provides for a prospective normal value system. In a prospective normal value system, the importer's liability is determined through the comparison of the price paid by the importer in a given transaction and the prospective normal value. Under this system, prices paid in other export transactions have no bearing on this importer's liability.[127]

After examining how a prospective normal value system operates, the panel concluded that "[i]f the determination of liability for anti-dumping duties can be determined on a transaction-specific basis in a prospective normal value system, there is no reason why the same cannot be the case in the context of the retrospective duty assessment system under Article 9.3.2."[128]

111. Because in a prospective normal value system, liability for antidumping duties is incurred only to the extent that prices of individual export transaction are below the normal value, the panel in *US – Zeroing (Japan)* concluded, "the fact that express provision is made in the AD Agreement for this sort of system confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transactions below the normal value and that the AD Agreement does not require that in calculating margins of dumping the same

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[125] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53 ("Under a prospective normal value duty assessment system, anti-dumping duties are assessed as individual import transactions occur, by comparing a transaction-specific export price against a prospective normal value. . . . In the context of such transaction-specific duty assessment, it makes no sense to talk of a margin of dumping being established for the product as whole, by aggregating the results of all comparisons, since there is only one comparison at issue.")

[126] *US – Zeroing (Japan) (Panel)*, para. 7.201.

[127] *US – Stainless Steel (Mexico) (Panel),* para. 7.131.

[128] *US – Stainless Steel (Mexico) (Panel),* para. 7.131. In *US – Zeroing II (EC)*, the panel also stated that it tended to "agree with the proposition that the recognition in the Agreement of a prospective normal value system reinforces the argument that dumping may be determined on the basis of individual export transactions, and note that the panel in *US – Stainless Steel (Mexico)* also agreed with this point of view." *US – Zeroing II (EC) (Panel),* para. 7.166.

significance be accorded to export prices above the normal value as to export prices below the normal value."[129]

112. If in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of antidumping duties, without regard to whether or not prices of other export transactions exceed normal value, there is no reason why liability for payment of antidumping duties may not be similarly assessed on the basis of export prices less than normal value in the retrospective systems applied by the United States.[130]

113. The Appellate Body has disagreed with this view, arguing that the duty collected at the time of importation under a prospective normal value system does not represent the margin of dumping within the meaning of Article 9.3 and noted that such duty is subject to review under Article 9.3.2.[131] In *US – Zeroing (Japan)*, for example, the Appellate Body stated:

> Under a prospective normal value system . . . under Article 9.3.2, the amount of duties collected is subject to review so as to ensure that, pursuant to Article 9.3 of the Anti-Dumping Agreement, the amount of the anti-dumping duty collected does not exceed the margin of dumping as established under Article 2. It is open to an importer to request a refund if the duties collected exceed the exporter's margin of dumping. Whether a refund is due or not will depend on the margin of dumping established for that exporter.[132]

114. However, the panel in *US – Stainless Steel (Mexico)* found this reasoning unpersuasive:

> We note that Article 9.3 does not shed light on how duty assessment proceedings are to be carried out. We would think, however, that a duty assessment proceeding with regard to duties collected on the basis of a prospective normal value system would have to be consistent with the nature of the referenced system. It would have been quite illogical, in our view, if the drafters allowed prospective normal value systems and yet envisaged that duties collected under such a system would be subject to a duty assessment proceeding under Article

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[129] *US – Zeroing (Japan) (Panel)*, para. 7.205; *see also US – Zeroing (EC) (Panel)*, para. 7.206.

[130] *US – Zeroing (Japan) (Panel)*, para. 7.208 ("We see no textual basis in Articles 9.3 and 9.4 for the view that if an authority assesses the amount of the anti-dumping duty on a retrospective basis by examining export transactions that have occurred during a certain period, it is obligated to take into account export prices above the normal value that it would not have been required to take into account if it had applied a prospective normal value system.").

[131] *US – Zeroing (Japan) (AB)*, para. 160; *US – Stainless Steel(Mexico) (AB)*, para. 120; *US – Zeroing II (EC) (AB)*, paras. 294-95.

[132] *US – Zeroing (Japan) (AB)*, para. 160.

> 9.3 in a manner that would require the authorities to calculate a margin of dumping not on the basis of the data pertaining to the importer seeking the initiation of the proceeding, but based on the aggregated data pertaining to the exporter(s) from whom the importer imports. The prospective normal value system is based on the notion of transaction-based duty collection. The Appellate Body's reasoning that duties collected under such a system are nevertheless subject to duty assessment proceedings just like other duties assessed on a prospective basis is, therefore, far from being convincing.[133]

To the extent that the Appellate Body suggests that Article 9.3 requires consideration of the "product as a whole" for determining the margin of dumping, the United States recalls that Article 9.3.2 requires that a request for refund must be "duly supported by evidence." Accordingly, under this interpretation, an importer who seeks a refund in a prospective normal value system would have to provide evidence that relates to "product as a whole," not just an importer's own entries. This would make it very difficult, if not impossible, for a importer to obtain a refund.

115. Further, accepting Brazil's interpretation that a Member must aggregate the results of *"all"* comparisons on an exporter-specific basis would require that retrospective reviews be conducted, even in a prospective normal value systems, in order to take into account "*all*" of the exporters' transactions. The results of the retrospective review would be to determine antidumping duty liability on a retrospective basis. This result, however, is contrary to the very concept of the prospective normal value system. As the panel in *US – Zeroing (Japan)* explained, the "liability for payment of anti-dumping duties is final in a prospective normal value system at the time of importation of a product."[134] In effect, prospective normal value systems will become retrospective.[135] If, in fact, Members had intended prospective normal value systems to have such reviews, one would have expected Members to have provided for this in explicit agreement language.

116. Additionally, Brazil argues that the Appellate Body concluded that there is no basis "for disregarding the results of comparison where the export price exceeds the normal value when calculating the margin of dumping for an exporter" and that other provisions of the AD agreement, such as Article 9.4 and 2.2.1, are explicit about the permissibility of disregarding

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[133] *US – Stainless Steel (Mexico) (Panel)*, para. 7.133.

[134] *US – Zeroing (Japan) (Panel)*, para. 7.205.

[135] This conclusion was also reached in a Canadian parliamentary report on potential changes to its prospective normal value system. In that report and at its trade policy review, Canada expressed its view that in a prospective normal value system, each entry provides a margin of dumping. Report on the Special Import Measures Act, House of Commons Canada, December 1996, http://www.parl.gc.ca/35/Archives/committees352/sima/reports/01_1996-12/chap4e.html (Exhibit US-2) (hereinafter "SIMA Report").

certain matters.[136] Brazil argues that the Appellate Body concluded that "when the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly."[137] First, this analysis is premised on the assumption that there is a general rule that the "margin of dumping" may only exist at an aggregate level and not at the transaction-specific level, the very thing that Brazil seeks to prove by this analysis. However, so long as "margins of dumping" are understood to exist at a transaction-specific level, there is no obligation to aggregate the results for non-dumped transactions with the margins of dumping found in connection with transactions where the price is less than normal value. Accordingly, nothing is disregarded. Duties are assessed in the amount of dumping that is found on a transaction-by-transaction basis. Non-dumped transactions result in no additional duties. Second, Brazil relies upon provisions that do not define "margin of dumping." They are exceptions to different rules. Article 2.2.1 sets forth the rules for treating sales below per unit cost of production in determining normal value, and the cited portion of Article 9.4 only applies in a limited situation, when an exporter or producer was not selected for examination.

117. Brazil provides a hypothetical example arguing that comparing transaction-specific U.S. prices against the average home market price without granting offsets would lead to a higher margin than the margin determined for the product as a whole.[138] Brazil appears to assume that the only appropriate methodology for determining dumping margins in the assessment proceedings is to calculate weighted-averages for the home and exporting country markets, respectively, and compare these averages. However, Article 9.3 of the AD Agreement does not prescribe a particular comparison methodology for assessment proceedings; Members are permitted to determine normal values by averaging home market prices and comparing that average normal value to individual export transaction prices. To illustrate, in Brazil's hypothetical example, there are three export transaction of equal quantities to the United States priced at $5, $10, and $15, respectively. In the home market, during the same month, the exporter also sells equal quantities of identical product priced at $5, $10, and $15, respectively. The results of average normal value to individual transactions comparisons are such that the $5 export transaction is sold at $5 less than normal value, and the $10 and $15 export transactions are not sold at less than normal value. Brazil's complaint appears to be that a positive dumping margin for one transaction is found using average-to-transaction comparisons, but no dumping is found when using average-to-average comparisons. Of course, if average-to-average and average-to-transaction comparisons always produced the same result, there would have been no purpose in adopting an obligation in Article 2.4.2 – applicable only in Article 5 investigations – that provided for the use of average-to-transaction comparison in certain circumstances.

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[136] Brazil's First Written Submission, para 72.

[137] Brazil's First Written Submission, para 72.

[138] *See* Brazil's First Written Submission, paras. 66-67.

118. Because there is no obligation to refrain from the average-to-transaction comparison methodology under Article 9.3, there is no basis to conclude that the fact that applying such a comparison method produces different results than an average-to-average comparison method constitutes an inconsistency with the obligations of Article 9.3. Moreover, it is worth noting that applying a transaction-to-transaction comparison method to Brazil's example could result in a higher dumping margin. Suppose, for example, that the transactions are identical in all respects, but that the three export transactions occurred on the same day as the $15 home market transaction. In such circumstances, the normal value for each export price would be $15, and only the $15 export price would be non-dumped. Accordingly, it cannot be presumed that finding $5 dumping using the U.S. methodology for assessment is inconsistent with Article 9.3 simply because it produces a result different from that which would be obtained by using average-to-average comparisons.

5. Brazil Has Failed to Satisfy its Burden of Proving That "Zeroing" Was Applied to, or Had an Impact on, the Challenged Margins of Dumping

119. With respect to certain of Brazil's claims, Brazil has failed to make a *prima facie* case as to the facts. Brazil has challenged the calculation of dumping margins[139] determined for two respondents, Fischer and Cutrale, in two administrative reviews.[140] However, in each of the challenged reviews, the challenged margin was zero or *de minimis* for one of these two respondents, such that Brazil cannot establish that the margin should have been any lower to be consistent with the covered agreements.

120. In the first administrative review, Commerce determined a *de minimis* margin of dumping for Cutrale.[141] In the second administrative review, Commerce calculated a margin of 2.17 percent for Cutrale and zero percent for Fischer. As a result of that review, as Brazil

[139] As discussed in detail above, the United States understands the obligations of Article 9.3 to apply with respect to the amount of duties collected, not to a "margin of dumping" as Brazil has described in its First Written Submission. As explained in this section, however, even if Brazil's interpretation of the obligations were correct, Brazil has failed to meet its burden of proof with respect to the "margins of dumping" at issue in this dispute.

[140] As explained above, one of these reviews, (the second administrative review) is outside the Panel's terms of reference. Even if it were within the terms of reference, Brazil's claims with respect to it should be rejected, as described in detail in this section.

[141] Although the AD Agreement does not impose any *de minimis* rate requirements with respect to assessment proceedings, as a matter of the United States law, in administrative reviews, Commerce considers any margin below 0.5% as *de minimis*, *i.e.*, essentially treats it as zero. Accordingly, Commerce did not impose any estimated duties on Cutrale's entries made after the final results of the first administrative review were issued, or on Fischer's entries made after the final results of the second administrative review were issued.

acknowledges, Commerce instructed CBP to liquidate Fischer's entries made during the period of review without regard to antidumping duties.[142]

121. The Panel should find that the United States has not acted inconsistently with the covered agreements with respect to the margin of dumping for Cutrale in the first administrative review. Furthermore, even aside from the fact that the second administrative review is outside the Panel's terms of reference, the margin of dumping and assessment rate calculated for Fischer in the second administrative review is not inconsistent with the covered agreements. Brazil fails to explain how the absence of any antidumping duty for Fischer in the second administrative review is inconsistent with Article 9.3 (which provides that the "amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2"), or any other provision, of the AD Agreement. Likewise, Brazil provided no explanation as to why Commerce's determination that Fischer's product was not dumped (*i.e.*, the margin of dumping was zero) is inconsistent with either the AD Agreement or Article VI of GATT 1994. A zero or *de minimis* margin of dumping cannot exceed any supposed "ceiling" Brazil argues is provided for in the relevant provisions of the covered agreements,[143] and, where no duties are assessed, no duties are imposed in excess of the margin of dumping, even under Brazil's interpretation of the obligations of Article 9.3 of the AD Agreement and Article VI:3 of the GATT 1994.[144]

122. Additionally, with respect to the assessment for Fischer in the first administrative review, Brazil has failed to meet its burden of proof. The burden of proving that an obligation has not been satisfied is on the complaining party. Article 17.5(ii) of the AD Agreement provides that a panel shall examine the matter before it on the basis of "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing member." In support of its allegation that Commerce used zeroing in calculating the margins of dumping the two administrative reviews at issue, Brazil submitted several exhibits (*e.g.*, BRA-29, -30, -32, -33, -36, -38) containing computer program logs purportedly demonstrating how Commerce calculated dumping margins for Fischer and Cutrale in these administrative reviews. The statement by Michael Ferrier (BRA-31) suggests that (with the exception of BRA-33) these exhibits are the "actual logs" released by Commerce to counsel for Fischer and Cutrale.[145]

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[142] Brazil's First Written Submission, para. 47.

[143] Brazil's First Written Submission, para. 64.

[144] Brazil also appears to challenge the estimated duty rates calculated in the administrative reviews. As explained in Section II above, estimated duty rates are not final antidumping duties. In any event, no estimated duty requirements were imposed on Cutrale in the first administrative review or on Fischer in the second administrative review.

[145] *See* Exhibit BRA-31, para. 9. It should be noted that none of the public summaries of the program logs and outputs submitted by Brazil was generated by Commerce. The United States also notes that Brazil's evidence provided at Exhibit BRA-25 (related to the third administrative review) is similarly not evidence of Commerce's actual calculations with respect to Fischer. These calculations are not relevant to Brazil's "as applied" claims for the first and second administrative reviews and are addressed in Section V.C of this submission.

Exhibit BRA-30 (both the public and the BCI version) was submitted to demonstrate that Commerce used zeroing in calculating the dumping margin for Fischer in the first administrative review. Line 5320 of Exhibit BRA-30 states: "This program started running on Thursday, April 10, 2010 - 14.51." Commerce completed the first administrative review in 2008, almost two years before this program was run. Someone other than Commerce must have generated this margin program log long after the first administrative review was completed. The assertion that this log is an actual log released by Commerce is inaccurate.[146]

123. While Brazil asks the Panel to find that Exhibit BRA-30 is evidence of the calculations Commerce performed for Fischer in the first administrative review, this exhibit is not evidence of the calculation Commerce actually performed. Commerce routinely releases its calculations to the respective parties and has procedures that enable parties to obtain such documentation upon request. In this context, performing a new calculation to attempt to reproduce the actual calculation does not satisfy the burden of proof; Brazil has failed to demonstrate that the challenged margins of dumping were calculated with zeroing or that zeroing had any impact on those margins. Brazil's claims with respect to Fischer's margin of dumping, and assessment rate calculated in the first administrative review should therefore also be rejected.

C. Brazil's Claim with Respect to Continuous Application of Zeroing Procedures

124. As explained above, the "continued use of zeroing" is not a measure within the Panel's terms of reference under Article 6.2 of the DSU. Should the Panel conclude that Brazil's claim against this purported measure of "continuous application" is within its terms of reference, Brazil's argument that "the continued use of zeroing in consecutive anti-dumping determinations, including the original investigation and subsequent administrative reviews, by which antidumping duties are applied and maintained, constitutes ongoing conduct that violates Article VI:2 of the GATT 1994 and Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement*"[147] should be rejected by the Panel for multiple reasons.

125. Brazil bears the burden to prove its claim that "the continued use of zeroing in successive anti-dumping proceedings" occurred as a matter of fact and is inconsistent with provisions of the WTO agreements. Brazil has not met its burden of proof in this regard.

126. Brazil's claim of "continued use of zeroing" is premised on dumping margins calculated in the original investigation, final results of the first and second administrative reviews, and preliminary results of the third administrative review. As set forth above, neither the second nor

[146] *See* Exhibit BRA-31, para. 9. As indicated in his statement, Mr. Ferrier is an employee of a law firm representing a large Brazilian orange juice producer; his views should not be taken for those of an impartial expert. Also, Mr. Ferrier's conclusions rely on the exhibits. The burden remains on Brazil to establish that this evidence reflects the calculations that Commerce performed and that Brazil is challenging.

[147] Brazil's First Written Submission, para. 116.

third administrative review are within the terms of reference of this dispute as they were not consulted upon. In addition, with respect to the third administrative review, the calculations are merely preliminary results and do not constitute a "final action" that can be challenged.[148]

127. Moreover, also as noted above, the margin of dumping for Cutrale in the first administrative review was *de minimis*, and the margin of dumping and assessment rate for Fischer in the second administrative review were zero. As such, they cannot be found to be excessive in relation to any obligation under the covered agreements and do not provide a basis for a claim that the United States has continuously acted inconsistently with its obligations. In addition, as noted in the discussions of Exhibit BRA-30 above, Brazil has failed to satisfy its prima facie burden of establishing that "zeroing" was applied in the calculation of Fischer's dumping margin in the first administrative review.

128. The evidence with respect to the investigation likewise provides no support for Brazil's claim with respect to the "continued use of zeroing." Brazil has failed to establish that any negative comparison result was actually "zeroed" in the calculation of the dumping margins for Fischer and Cutrale in the original investigation, and that the necessary condition for activating the "zeroing" operation was even satisfied as a factual matter. If no comparison of export price and normal value results in a negative amount, the condition precedent for execution of the "zeroing" line of the computer program is never satisfied, and the "zeroing" operation is never applied. In fact, the exhibits provided by Brazil with respect to the original investigation demonstrate that there were only two comparisons made (referred to in the Exhibits as "observations") and that neither comparison resulted in an amount less than zero.[149] In other words, Brazil's own evidence demonstrates only positive comparison results, and no negative comparison results, in the margin calculations for Fischer and Cutrale.

129. The lack of any negative comparison results means that "zeroing" had no impact on the dumping margin calculation. Thus, even under Brazil's interpretation that the covered agreements impose a general prohibition against "zeroing," Brazil's own exhibits show that the dumping margins calculated in the original investigation simply did not exceed the dumping margins contemplated by those agreements. Brazil's claim that negative comparisons should

[148] As explained in Section V.A.1 above, preliminary results of administrative reviews are not applied as an assessment rate or an estimated duty rate. Rather, they are merely an interim calculation that provides a basis for interested parties to submit comments to Commerce for consideration in preparing the final results. And, as a factual matter, the documentation provided with respect to the preliminary results for Fischer in the third administrative review present similar concerns as those discussed above with respect to the first administrative review. In particular, the dates of the program logs Brazil submitted (Exhibit BRA-25) differ from the dates of the actual calculation Commerce performed. As they are not the program logs from Commerce's calculation of the preliminary results, there is no evidence of Commerce's actual calculations with respect to Fischer in the third administrative review.

[149] *See* Exhibit BRA-32 at 108, notes to lines 1518 and 1523; Exhibit BRA-33 at 94, notes to lines 3141 and 3146.

have been used to reduce the dumping margin is a mathematical impossibility, because the antidumping duty rate applied to an imported product cannot be less than zero.

130. Brazil argument that the alleged "continued use of zeroing" is even a measure that can be challenged, as well as a violation of the WTO agreements, is premised on its assertion that such "continued use" constitutes an "ongoing conduct."[150] Even were this a cognizable claim, as detailed above, the facts belie a conclusion that any such "ongoing conduct" exists or is likely to continue in the antidumping duty order that is at issue in this dispute.[151]

131. The United States has serious concerns about the rationale articulated by the Appellate Body with respect to "the use of the zeroing methodology in a string of connected and sequential determinations, in each of the 18 cases, by which the duties are maintained" in the *US – Zeroing II (EC)* dispute.[152] As explained in the request for a preliminary ruling, measures that do not and may never exist are not within a dispute settlement panel's terms of reference. However, it should be noted that Brazil's assertion that the facts of this case are "virtually identical" to the cases found to be inconsistent in that dispute[153] is not accurate. In *US – Zeroing II (EC)*, the Appellate Body found that the record supported findings of inconsistency only for four of the 18 cases challenged, *i.e.*, where "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time."[154] Each of the four cases where the Appellate Body concluded that there was "a sufficient basis for [the Appellate Body] to conclude that the zeroing methodology would likely continue to be applied in successive proceedings"[155] included: (1) the use of the zeroing methodology in the initial less than fair value investigation; (2) the use of the zeroing methodology in four successive administrative reviews; and (3) reliance in a sunset review upon rates determined using the zeroing methodology.

132. As explained above, there is no basis for such an approach in this case. First, Brazil's own evidence refutes its claim that "zeroing" had any impact on the dumping margins in the original investigation such that they would be inconsistent with any provision of the covered agreements. Second, unlike the *US – Zeroing II (EC) (AB)* cases, there have been no sunset reviews conducted of the orange juice order that relied upon margins calculated while zeroing.

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[150] Brazil's First Written Submission, para. 113.

[151] When bringing a challenge against an unwritten measure, a complaining party must clearly establish, through arguments and supporting evidence, both the existence of the alleged measure, and its precise content. *US – Zeroing (EC) (AB)*, paras. 196-98.

[152] *US – Zeroing II (EC) (AB)*, para. 180.

[153] Brazil's First Written Submission, para. 108.

[154] *US – Zeroing II (EC) (AB)*, para. 191.

[155] *US – Zeroing II (EC) (AB)*, para. 191.

There have been no sunset reviews conducted at all. Finally, as explained above, Brazil has failed to establish as a factual matter that "zeroing" was applied to, or had any impact on, any margin in the investigation or first administrative review, Fischer's margin in the second administrative review, or Fischer's margin in the preliminary results of the third administrative review. Even assuming, for the sake of argument, that Brazil were able to prove its claims regarding the remaining challenged margins, at most it would have shown that "zeroing" applied to one company in one proceeding covering a one year period. This would not constitute "a string of determinations, made sequentially. . . over an extended period of time."[156]

133. The facts presented in this dispute are more similar to some of the other cases in *US – Zeroing II (EC) (AB)* where the Appellate Body found that there was not enough evidence to support a finding that there was a continued application of the zeroing methodology.[157] The Appellate Body reasoned that only where there were "clear findings of fact concerning the use of the zeroing methodology, without interruption, in different types of proceedings over an extended period of time," did it consider those facts sufficient to make findings regarding the continued application of zeroing.[158] In this dispute, in contrast, there is no basis for finding that the zeroing methodology was used without interruption, that it was used in different proceedings, and that it was used over an extended period of time. For these reasons, there is no basis to make any findings under Article 9.3 of the AD Agreement or Article VI:2 of the GATT 1994 in this dispute.

134. In addition, with respect to Brazil's claim that the "continued use" of zeroing in successive anti-dumping proceedings is inconsistent with Article 2.4.2 of the AD Agreement, the express terms of Article 2.4.2 limit its application to the "investigation phase" of a proceeding. Article 2.4.2 provides,

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping *during the investigation phase* shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions . . . .[159]

In the order at issue in this dispute, however, the investigation phase is complete. To require the application of Article 2.4.2 to assessment proceedings, or to the amorphous "continued use" of

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[156] *US – Zeroing II (EC) (AB)*, para. 191.

[157] Brazil's First Written Submission overlooks that the Appellate Body found that it was unable to complete the analysis with respect to six cases where there was only evidence of "zeroing" in one segment of the proceeding, three cases where there was evidence of "zeroing" in two segments, and four cases where there was evidence of "zeroing" in three segments. *US – Zeroing II (EC) (AB)*, paras. 193, 194.

[158] *US – Zeroing II (EC) (AB)*, para. 195.

[159] Emphasis added.

zeroing in successive proceedings (including assessment proceedings) would read out of the AD Agreement Article 2.4.2's express limitation to investigations. Such a result would be inconsistent with the principle of effectiveness, under which all the terms of an agreement should generally be given meaning where possible.[160]

135. The limited applicability of Article 2.4.2 could not be plainer. The panel in *US – Zeroing (EC)* conducted a thorough analysis of the text of the AD Agreement, finding that:

> First, the phrase 'the existence of margins of dumping during the investigation phase' in Article 2.4.2 read in its ordinary meaning in the context of the *AD Agreement* as a whole means that Article 2.4.2 applies to the phase of the 'original investigation' i.e. the investigation within the meaning of Article 5 of the *AD Agreement* as opposed to subsequent phases of duty assessment and review. Second, our interpretation of the meaning of this phrase as limiting the applicability of Article 2.4.2 to investigations within the meaning of Article 5 is also consistent with the distinction made between investigations and subsequent proceedings in the various Appellate Body decisions. Third, alternative meanings suggested . . . are implausible at best and deny this phrase any real function, in contradiction with principles of interpretation. Fourth, this interpretation is entirely consistent with different functions played by 'original investigations' and duty assessment proceedings. . . .[161]

The panel in *US – Zeroing (EC)*, when making its own objective assessment of the facts before it, in accordance with the customary principles of international law, provided a thorough and solid review of the text and context of Article 2.4.2. In this regard, we request that this Panel find persuasive the reasoning put forth by the panel in *US – Zeroing (EC)*. The Panel should decline to extend the obligations of Article 2.4.2 to "successive proceedings" beyond the investigation.[162] And, as noted above, Brazil's own evidence indicates there were no export transactions in the orange juice investigation that yielded negative comparison values, and as such there is no basis for concluding that any "comparable export transactions" were disregarded.[163]

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[160] *See, e.g., Japan – Alcohol Taxes (AB)*, sections G & H (discussing fundamental principle of effectiveness in treaty interpretation); *see also US – 1916 Act (AB)*, para. 123.

[161] *US – Zeroing (EC) (Panel)*, para. 7.220.

[162] The Appellate Body declined to make any findings under Article 2.4.2 with respect to the "continued application of anti-dumping duties" in the *US – Zeroing II (EC)* dispute. *US – Zeroing II (EC) (AB)*, para. 199.

[163] The U.S. experience with the *US – Zeroing II (EC)* dispute demonstrates this point. In that dispute, after the Dispute Settlement Body adopted adverse rulings and recommendations with respect to the use of zeroing in the final determinations in four original investigations, Commerce issued new determinations under section 129(b) of the Uruguay Round Agreements Act with respect to those four investigations. During the section 129 proceedings, however, Commerce discovered that, in three of the four determinations, there were no offsets to provide, because all

VI. CONCLUSION

136. As set forth above, the United States respectfully requests that the Panel grant the U.S. requests for preliminary rulings and reject Brazil's "as applied" claims regarding assessment proceedings and its claim regarding the "continuous use of zeroing."

weighted-average to weighted-average comparisons demonstrated dumping, or the rates determined in the original determination were based upon facts available rates that did not involve zeroing. As such, the dumping margins did not change in the final results of the section 129 proceedings. *See* Exhibits US-3; US-4; US-5. In short, there simply is no basis to assume that "zeroing" will in fact take place in any antidumping proceedings – there may in fact be no "zeroing" at all. Brazil cannot meet its burden of proof merely by alleging that "zeroing" may or will occur.

LIST OF EXHIBITS

US-1	New Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, page 2349
US-2	Report on the Special Import Measures Act, House of Commons Canada, December 1996, http://www.parl.gc.ca/35/Archives/committees352/sima/reports/01_1996-12/chap4e.html (hereinafter "SIMA Report").
US-3	Final Results of Proceeding Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Purified Carboxymethylcellulose from Finland
US-4	Final Results of Proceeding Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Purified Carboxymethylcellulose from Sweden
US-5	Final Results of Proceeding Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Chlorinated Isocyanurates from Spain